85-633

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

AMREP CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Questions Presented

1. Where the Federal Trade Commission ("FTC") determines for the first time that a previously lawful and widely used contract term, providing for forfeiture of prior payments upon default under an installment land purchase contract, is "unfair" under Section 5 of the FTC Act, 15 U.S.C. §45, does the FTC have the power to restrain the use or enforcement of such a term in contracts executed prior to the FTC's determination?

2. Where the FTC finds that a respondent has committed unfair and deceptive practices under Section 5 of the FTC Act, does the FTC have the power to order the respondent to send notice of the FTC's finding to the respondent's past customers?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner AMREP Corporation prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on July 25, 1985.[1]

Opinions Below

The Opinion of the Court of Appeals, 768 F.2d 1171 (10th Cir. 1985), is annexed hereto as Appendix A. It affirmed an Order of the FTC dated November 2, 1983 and issued February 8, 1984, which was accompanied by an Opinion of the FTC, CCH Trade Reg. Rep. ¶ 22,117 (Nov. 2, 1983). Copies of the Order and Opinion of the FTC are annexed hereto as Appendix B.

1. Petitioner has no affiliates or subsidiaries which are not wholly-owned, except Sterling Title Company of New Mexico.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was dated and entered on July 25, 1985 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 15 U.S.C. § 45(c).

Federal Statutes Involved

The statutory provisions involved are set forth in Appendix D. They consist of:

1. Section 5 of the FTC Act, 15 U.S.C. § 45; and
2. Section 19 of the FTC Act, 15 U.S.C. § 57b.

Statement of the Case

On March 11, 1975, the FTC commenced a proceeding against Petitioner, a land developer, under § 5 of the FTC Act, 15 U.S.C. § 45, alleging that Petitioner had engaged in unfair and deceptive acts and practices in connection with the sale of land. The gravamen of the Complaint was that Petitioner had sold the land as a good investment whereas it was actually a poor investment, and that the use of certain contract clauses, including a clause permitting Petitioner to terminate a land sale contract on default of the purchaser and to retain prior payments as liquidated damages, constituted unfair practices.

The FTC found that Petitioner had engaged in unfair and deceptive acts and practices and on February 8, 1984, served an Order directing Petitioner to cease and desist from selling land except in compliance with the Order. The Order (App. B, p. 31a) also nullified Petitioner's rights under its existing land sale contracts. The Order (App. B, p. 33a) further directs Petitioner to mail a letter to all past purchasers of its land advising them of the proceeding and informing them of certain options which the FTC says are available to them (App. B, pp. 35a-37a).

On April 2, 1984, Petitioner filed a timely petition to review the Order of the FTC with the United States Court of Appeals for the

Tenth Circuit, pursuant to 15 U.S.C. § 45(c). Petitioner contended, citing authorities from other circuits, that the FTC has no power under § 5 of the FTC Act to apply its Order retroactively or to order notification to past purchasers. By an Opinion and Order entered July 25, 1985, the Court of Appeals affirmed the Order of the FTC in all respects.

Reasons for Granting the Writ

I

The decision of the Court below conflicts with the decision of the Ninth Circuit in *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), on the question whether the FTC has the power to recast the consequences of conduct occurring prior to the entry of its order.

Petitioner's land sale contracts provided that, in the event of an uncured default by a lot purchaser in making installment payments thereunder, after due notice, (a) all rights of the lot purchaser to the lot covered by his contract would terminate and (b) all amounts theretofore paid by such lot purchaser could be retained as liquidated damages.[2] Notwithstanding the common use of such a clause, which it termed a "forfeiture clause," the FTC determined for the first time that the use and enforcement of such clause constituted an unfair practice in violation of §5 of the FTC Act (App. B, pp. 115a-117a).

Based upon that determination, the FTC fashioned two provisions in its Order proscribing the use of forfeiture clauses. First, the Order prohibits Petitioner, prospectively, from including in any contract a forfeiture clause providing for the retention of any amounts above certain specified limits (App. B, p. 27a). Petitioner does not contest the power of the FTC to order such prospective prohibitions. Second, with respect to Petitioner's existing contracts, the Order (App. B, p. 31a) directs Petitioner to

2. An example of such provision is quoted at footnote 74 of the Opinion of the FTC (App. B, p. 115a).

> "Forbear from using or enforcing in any manner or representing that [Petitioner] will rely upon or enforce in any manner, against any purchaser, a contract clause which provides that the seller may retain all sums previously paid by the buyer in the event that the buyer fails to pay any installment due or otherwise to perform any obligation under the contract."

For the reasons discussed below, in enjoining Petitioner's use or enforcement of such clauses in its existing contracts, the FTC acted beyond the scope of its authority under §5 of the FTC Act. And in affirming that portion of the Order, the decision of the Court below conflicts with the principle set forth in *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), that the FTC has no statutory authority to give its cease and desist orders retroactive effect.

The so-called forfeiture clause, used in Petitioner's installment land sale contracts, is and has been widely used and is enforceable under the laws of almost every state. The right of a vendor of land to retain all payments made by the vendee, upon the vendee's abandonment of the contract, has long been the rule at common law. So noted a commentator as Williston has stated that "the great majority of decisions" permit a forfeiture in such a circumstance. 5 Williston, *Contracts*, § 791 at 771.

Petitioner's land sales contracts do not contain a promise by the purchaser to pay the stated lot purchase price and thus, if the purchaser defaults in making payments, Petitioner's sole remedy would be, upon due notice, to invoke the forfeiture clause, terminate the contract and retain the amounts theretofore paid. By prohibiting Petitioner from enforcing the forfeiture clause in its existing contracts, the FTC effectively voided all of Petitioner's rights under those contracts.[3]

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3. It should be noted that the provision in the Order relating to the forfeiture clause applies to all of Petitioner's outstanding contracts, notwithstanding the fact that the FTC did not find that all of Petitioner's contracts had been procured by deceptive practices or high-pressure sales tactics; in fact, the FTC dismissed the charges of misrepresentation relating to sales at Eldorado at Santa Fe, one of the Petitioner's four subdivisions. App. B, p. 93a.

In *Heater* v. *FTC, supra*, the FTC had determined that a party had obtained moneys through the use of unfair and deceptive practices. In addition to ordering the party to cease and desist from further engaging in such practices, the FTC concluded that the continued retention of such moneys also constituted an unfair and deceptive practice and therefore directed that the moneys be refunded. On appeal, the Ninth Circuit held that the FTC was without power under § 5 of the FTC Act to order such refund.

In arriving at its decision in *Heater*, the Ninth Circuit reviewed the legislative history of the FTC Act and, in particular, the broad latitude given the FTC in determining whether an act is "unfair". The Court found that, to balance the FTC's "quasi-legislative" power to designate an act as "unfair" even in circumstances where no adequate prior notice had been given that such act would be deemed to be unfair, Congress limited the FTC's remedial power with respect to acts found to be unfair. Thus, rather than give the FTC the power to seek retroactive relief, Congress limited the power of the FTC to the issuance of cease and desist orders to prevent future violations of § 5 after the acts constituting the violations had been declared by the FTC to be unfair. 503 F.2d at 322-24.

Rejecting the FTC's interpretation of § 5 of the FTC Act in a manner which would give the FTC the power to order restitution, the Ninth Circuit wrote:

> "The construction placed by the Commission upon its power to define 'an unfair act or practice' would, if accepted, operate to invest the Commission with remedial powers which are inconsistent with the overall purpose of the Act. In particular, it would permit the Commission to order private relief for harm caused by acts which occurred *before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview*. Such an order, we think is impermissible..." 503 F.2d at 323 (emphasis added).

The Court below attempted to distinguish this case from *Heater* by stating that the Order "operates only prospectively,

and merely prevents [Petitioner] from continuing to profit from its inclusion of an illegal forfeiture clause in its past contracts." (App. A, p. 15a). To the contrary, however, if Petitioner were barred from enforcing or representing that it would rely upon or enforce in any manner the forfeiture clause in the case of an uncured default, it would mean that Petitioner could not terminate the rights of the purchaser to the land which is the subject of the contract. Therefore, Petitioner would never be able to sell the land under contract to anyone else, notwithstanding its retention of title, because that land would be subject to a dormant executory contract in perpetuity. Nor could Petitioner seek to recover any amounts due under the contract (App. B, p. 31a). And Petitioner may not even assert the contract clause as a defense if a purchaser demands or sues for a refund.

In concluding that the Order here operates only prospectively, the Court below adopted the position of the FTC which the *Heater* Court had rejected. In *Heater*, the FTC had argued that the order there was "aimed prospectively at the continuing failure to refund, that it imposes neither a punitive sanction nor compels the payment of reliance or expectancy damages and that it serves the public interest independent of any incidental private benefit." 503 F.2d at 322 (footnote omitted). In rejecting that contention, the Ninth Circuit analyzed the practical effect of the order in light of the legislative history of § 5: "[T]he power to attach consequences to prior conduct was thought inconsistent with the Commission's contemplated quasi-legislative and educational function." 503 F.2d at 324.

The action by the FTC clearly constitutes the reformation of Petitioner's existing contracts. The Order redefines the private rights and remedies of the parties to Petitioner's existing contracts. For the reasons set forth in *Heater*, the FTC has no power to order the reformation of contracts. The invalidation of the forfeiture clause was not only unauthorized by Congress, but in fact contravened the intention of Congress as evidenced by a 1975 Amendment to the FTC Act.

The 1975 Amendment was an addition to the Act -- § 19 (15 U.S.C. § 57b). By that statute, the FTC was authorized to commence a civil action in a United States District Court against a person, partnership or corporation with respect to which a cease and desist order under § 5 has become "final" to obtain specified forms of relief, including "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be".[4]

In such civil action, the FTC must prove that the act or practice "is one which a reasonable man would have known under the circumstances was dishonest or fraudulent". 15 U.S.C. § 57b(a)(2); *FTC* v. *Macmillan, Inc.*, CCH Trade Cases ¶ 65,553 (N.D. Ill. 1983). The Court may only grant relief which it finds to be "necessary" to redress the injury. 15 U.S.C. § 57b(b); Kintner and Westermeier, Jr., *Obtaining Refunds for Consumers Under Section 19 of the Federal Trade Commission Act*, 29 Syracuse Law Review 1025, 1051-1066 (1978).

By invalidating the forfeiture clause, the FTC has circumvented the entire statutory procedure enacted by Congress. The FTC could not prove to a court that the use of a forfeiture clause widely used throughout the United States is an act which a reasonable man would have known was "dishonest or fraudulent", or that the reformation of Petitioner's contracts to deprive Petitioner of any right or remedy whatsoever thereunder was "necessary". Although the remedies provided by 15 U.S.C. § 57b are in addition to existing remedies, and the statute is not to be construed to affect any authority of the FTC under any other provision of law (15 U.S.C. § 57b(e)), as has been seen, under 15 U.S.C. § 45, the FTC had no power to reform Petitioner's existing contracts in the proceeding below.

The Court below read *Heater* to stand "only for the proposition that the Commission cannot order retroactive private relief (*e.g.*, restitutionary relief or rescission of a contract) in a cease and

4. A cease and desist order becomes final upon completion of all appeal proceedings or specified time periods if appeals are not taken. 15 U.S.C. § 45(g).

desist order." App. A, p. 15a. Apart from the fact that reformation of Petitioner's existing contracts *is* private relief, that reading was far too narrow. The *Heater* Court did not limit its analysis to the issue of private relief, but rather addressed the broader issue of the power of the FTC to define conduct as unfair and simultaneously issue an order having a retroactive impact. Thus, the *Heater* Court wrote as follows:

> "Regardless of how egregious petitioner's conduct, or how unreasonable his reliance on the legality of the operation, the Commission was not given the power to recast the consequences of conduct occurring prior to its entry of an order; Congress was unwilling to subject the operation of a business to the risk of subsequent Commission condemnation." 503 F.2d at 325 (footnotes omitted).

As the Court below observed, this Court has stated that courts will not interfere with orders of the FTC except where the remedy selected has no reasonable relation to the unlawful practices found to exist. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-613 (1946). Under the "reasonable relation" test, an FTC order may extend to products of a respondent other than those involved in the FTC proceeding, as in *Colgate-Palmolive,* or may impose restraints against otherwise lawful activities where necessary to prevent revival of unlawful activities, as in *National Lead Co.* It is submitted that this Court should make clear that its prior pronouncements were not intended to authorize the courts to affirm FTC orders exceeding the powers of the FTC formulated by Congress simply because a reasonable relation to the unlawful practice exists. An order awarding damages or restitution may bear a reasonable relation to an unlawful practice. However, it is highly questionable that this Court intended by its repeated affirmations of the reasonable relation principle that the lower courts should permit the FTC to order such relief in a § 5 proceeding.

The question presented here has serious due process implications. Section 5(a) of the FTC Act declares "unfair" acts or practices to be unlawful. The word "unfair" is extremely vague and highly subjective, imparting no real notice as to what specific conduct may be included within its reach. The FTC was given a broad power to declare specific acts and practices to be "unfair", and therefore unlawful, even where the target of a § 5 proceeding and the entire industry had never been given prior notice that the subject acts and practices would be so construed. *Heater* v. *FTC, supra.* That power of the FTC, combined with a power to apply its determinations retroactively, is inconsistent with fundamental principles of due process, fairness and the intention of Congress in enacting that statute.

II

The decision of the Court below conflicts with the decisions of the Ninth Circuit in *Congoleum Ind., Inc.* v. *CPSC*, 602 F.2d 220 (9th Cir. 1979) and the Fourth Circuit in *Barrett Carpet Mills* v. *CPSC*, 635 F.2d 299 (4th Cir. 1980), on the question whether § 5 of the FTC Act, 15 U.S.C. § 45, confers the power to order notification to past purchasers.

By paragraph VI.K. of the FTC's Order (App. B, p. 33a), Petitioner was ordered to mail a notice to its past lot purchasers (the "notification letter") in the form annexed to the Order (App. B, pp. 35a-37a). As interpreted by appellate counsel for the FTC in the Court below, the Order requires Petitioner to mail the notification letter to all past purchasers, including those who had paid for their lots in full as long ago as 1961, those who had sold their lots and those who had exchanged their lots and become residents of Petitioner's subdivisions. The notification letter would advise past purchasers of certain options which the FTC says are available to them, including the refusal to make further payments to Petitioner and the initiation of litigation against Petitioner. The Court below held that the FTC had the power to order Petitioner to send the notification letter (App. A, pp. 15a-16a). That holding conflicts with the decisions in *Congoleum*

Ind., Inc. v. *CPSC, supra,* and *Barrett Carpet Mills v. CPSC, supra,* which hold that § 5 of the FTC Act does not authorize an order requiring notification to past purchasers; the holding by the Court below authorizes action by the FTC which is inconsistent with the overall purpose of § 5 of the FTC Act.

In a proceeding under § 5 of the FTC Act, if the FTC is of the opinion that the challenged act or practice is unfair or deceptive, it may order the respondent to "cease and desist from using such...act or practice." 15 U.S.C. § 45(b). However, as appears from the discussion in Point I hereof, the FTC may not provide retroactive relief in the nature of refunds or reformation of contracts. The same is true in the case of relief in the form of public notification to past purchasers. Instead, pursuant to the 1975 enactment of § 19 of the FTC Act, 15 U.S.C. § 57b, the FTC, *after a cease and desist order has become final,* may, in appropriate circumstances, seek a court order providing, among other things, for public notification to past purchasers.

The forms of relief available under §19 include "the refund of money"--at issue in *Heater*--and "public notification respecting the rule violation or the unfair or deceptive act or practice," 15 U.S.C. § 57b(b)--the subject of paragraph VI.K. of the FTC's Order.

The Court below failed to appreciate the distinction between notification to past purchasers and corrective advertising addressed to future consumers, cited cases upholding the FTC's authority to order corrective advertising addressed to future consumers (App. A, p. 15a), and read these cases as authority for the Order here.[5]

The power to order corrective advertising addressed to future consumers is within the FTC's "cease and desist" authority under the Act; once a violation is found, the FTC can order a respondent to cease and desist from selling its product unless it makes affirmative disclosures to future consumers. However, § 5 of the FTC Act does not authorize the power to order notification to past

5. Contrary to the assumption made by the Court below (App. A, p. 15a), Petitioner did not challenge the power of the FTC to order disclosures to prospective lot purchasers.

purchasers. *Barrett Carpet Mills* v. *CPSC, supra; Congoleum Ind., Inc.* v. *CPSC , supra,* 602 F.2d at 225-26. Although *Barrett Carpet Mills* and *Congoleum Industries* involve the Flammable Fabrics Act, 15 U.S.C. § 1191 et seq., which is administered by the Consumer Product Safety Commission, the successor agency to the FTC, these cases are not distinguishable from this case because the remedies under the Flammable Fabrics Act are established by reference to the remedial provisions of § 5 of the FTC Act. *Barrett Carpet Mills* v. *CPSC, supra,* 635 F.2d at 301-302.

In *Warner-Lambert Co.* v. *FTC,* 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), cited by the Court below (App. A, p. 15a), the D.C. Circuit held that the FTC had the power to order corrective advertising addressed to future consumers. It found that such a remedy was necessary to dispel the accumulated impact of past advertising found to be misleading, and that to allow consumers to continue to buy the product (Listerine) on the strength of the false impression built up by prior advertising would be unfair and deceptive, 562 F.2d at 759-61. In discussing the 1975 Amendment to the FTC Act, the *Warner-Lambert* Court noted that

> "the 'public notification' contemplated by the amendment [§ 19] is directed at *past* consumers of the product ('to redress injury'), whereas the type of corrective advertising currently before us [pursuant to § 5]is directed at *future* consumers." 562 F.2d at 757 (emphasis by the Court).

Grolier Inc. v. *FTC,* 699 F.2d 983 (9th Cir.), *cert. denied,* 104 S. Ct. 235 (1983) and *Encyclopedia Britannica, Inc.* v. *FTC,* 605 F.2d 964 (7th Cir. 1979), *cert. denied,* 445 U.S. 934 (1980), also cited by the Court below (App. A, p. 15a), involved disclosures to future consumers, and therefore are not germane to the issue here.

Paragraph VI.K. of the Order requires Petitioner to perform an act tantamount to self-flagellation, not to "cease and desist" from engaging in acts or practices either found to be unlawful or which might be employed to circumvent an order. The Court below

affirmed that provision in the Order based on a finding that it was "reasonably related to [Petitioner's] past violations and practices", citing *Federal Trade Commission* v. *Colgate-Palmolive Co., supra*. App. A, pp. 15a-16a. Again, it is submitted that it is doubtful that this Court intended by its pronouncements of the "reasonable relation" standard to authorize FTC orders exceeding the scope of the FTC's statutory powers, and that that standard requires clarification.

The FTC acted outside of its statutory power, as interpreted by the Fourth and Ninth Circuits, in ordering Petitioner to send the notification letter; the Court below erred in affirming the Order.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed Court of Appeals
Tenth Circuit—Jul 25 1985
HOWARD K. PHILLIPS, Clerk

No. 84-1434

AMREP CORPORATION,

Petitioner

v.

FEDERAL TRADE COMMISSION,

Respondent

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

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Frederick E. Dooley, Jr., Attorney, Federal Trade Commission, Washington, D. C. (John H. Carley, General Counsel, Ernest J. Isenstadt, Assistant General Counsel, and George E. Schulman, Attorney, Federal Trade Commission, Washington, D. C., with him on the brief) for Respondent.

Before MCKAY and DOYLE, Circuit Judges, and BROWN, District Judge*

DOYLE, Circuit Judge.

* Honorable Wesley E. Brown, United States Senior Circuit Judge, District of Kansas, sitting by designation.

Appendix "A"

Petitioner AMREP Corporation (Amrep) seeks review of a cease and desist order entered against it by the respondent Federal Trade Commission (FTC or Commission) on February 8, 1984. This court has jurisdiction in this case pursuant to 15 U.S.C. § 45(c). We affirm the FTC's order in all respects.

The Basic Facts

Amrep is an Oklahoma corporation with its principal place of business in New York City. It was first incorporated as American Realty & Petroleum Corporation in 1955.[1] Prior to August, 1961 Amrep was engaged exclusively in operating oil and gas properties in Oklahoma. In August, 1961, however, the company entered the business of acquiring large tracts of unimproved land. It subdivided the land into lots and sold them in the subdivisions to the general public. Amrep's principal business today continues to be selling lots to the public in its subdivisions.

On March 11, 1975, the FTC issued a formal complaint charging that Amrep used unfair and deceptive sales practices in connection with sales of vacant lots in its subdivisions. The complaint centered on the sales practices used in connection with four Amrep subdivisions: Rio Rancho Estates, near Albuquerque, New Mexico; El Dorado at Santa Fe, New Mexico; Silver Springs Shores near Ocala, Florida, and Oakmont Shores, in Missouri. The Commission's complaint was that Amrep had falsely represented to potential buyers that its lots were a safe investment sure to yield short-term profits. It further alleged that Amrep had made false representations concerning the growth rates of the areas in which its subdivisions were located, and that it had falsely represented that land in its subdivisions was steadily increasing in value. It was also alleged that Amrep had made false representations about physical and legal constraints on the growth of Albuquerque that made an investment in land at Rio Rancho Estates appear more attractive to consumers

1. The Corporation changed its name to its present form in September, 1967.

than it actually was. The complaint also alleged that Amrep used unfair high-pressure sales tactics in marketing its lots, and that its prepared form contracts for the purchase of land contained unfair and illegal provisions.

Hearings before an Administrative Law Judge on the complaint began in June, 1976. They were stayed by order of the United States District Court for the Southern District of New York as of July 30, 1976. This action was taken in order to complete a criminal proceeding against Amrep and its officers in that court. *See United States* v. *Amrep Corp.*, 405 F.Supp. 1053 (S.D.N.Y. 1976), *aff'd without opinion*, 535 F.2d 1240 (2d Cir. 1976). The hearings resumed on May 2, 1977, following the completion of the criminal trial conducted by the government. That trial resulted in convictions of Amrep and six leaders on March 10, 1977.[2] They continued intermittently until May 17, 1978. The hearing record was closed on May 31, 1978.

Discussion of the Evidence

The exhibits and testimony introduced during those hearings revealed that during the time period covered by the FTC's complaint (1961-1975), Amrep had marketed its lots primarily through company-sponsored dinner parties. These parties were held all over the nation, usually far from the Amrep subdivision that was being promoted at the party. Their format did not vary. Prospective buyers (usually husband and wife) were invited to the parties and were seated at small tables (usually two couples together with an Amrep salesman). After the prospective buyers had been served a free dinner and substantial amounts of alcoholic beverages, an Amrep speaker would introduce promotional films on the particular Amrep subdivision that was the subject of the dinner party. These promotional films were produced by Amrep's central office and were described by the Administrative

2. These convictions were affirmed by the United States Court of Appeals for the Second Circuit. *United States* v. *Amrep Corp.*, 560 F.2d 539 (1977), *cert. denied*, 434 U.S. 1015 (1978).

Law Judge as masterpieces of illusion. For example, the Amrep film on El Dorado at Santa Fe made the New Mexico desert bloom through liberal use of green spray paint on the grass shown in the film.

After the conclusion of the films, the speaker gave a brief talk on the particular subdivision in question. The speakers' presentations had been prepared in writing by Amrep's central office in New York. The emphasis was made that Amrep land was a great short-term investment and a sure-fire hedge against inflation. Following the speaker's completed presentation, prospective buyers were pressured into signing land purchase agreements that very night by the salesmen sitting at their tables. These salesmen's tactics had been also dictated by the New York office. The salesmen were told to create artificial excitement by calling out "holds" on particular pieces of property. This was so as to create an artificial impression of increasing property values by stressing that Amrep had dictated increases in the list prices of lots in the subdivision, and to create artificial pressure to purchase land by filling out Amrep-prepared form contracts with required personal data before prospective buyers had indicated their willingness to buy land. These high-pressure tactics led many individuals to buy Amrep land sight unseen.

The individuals who made these sight unseen land purchases were not firmly bound to carry through with them at this time. They had the right to cancel their purchases if they visited the Amrep subdivision where they had purchased land within six months and were not satisfied with their purchases. If they were merely dissatisfied with the particular lot they had purchased, they also had the right to exchange it for another lot of comparable value within the subdivision. To facilitate purchasers' inspections of their lots, Amrep provided chartered trips to its subdivisions. These trips were not conducive to dispassionate inspections of the purchasers' new properties. Indeed these visits were almost as carefully scripted as were Amrep's dinner parties. The purchasers (now known as "homesite owners") were again

plied with substantial quantities of alcoholic beverages. During their stay at the subdivision, they were taken on tours of the region's most noteworthy attractions. These views did not include the Amrep subdivision. Purchasers' inspections of their lots were usually limited to a couple of hours on the last day of the trips. If the buyers showed any inclination to cancel their purchasers, Amrep's salesmen were instructed to make overly optimistic representations to the buyers about the pace of development in the subdivision and about Amrep's plans for the subdivision's future. The salesmen also stressed the "exchange privilege" and pointed out more desirable lots in other parts of the subdivision. They did not, however, point out that more desirable lots of equal value were often smaller than the lots that the buyers had purchased, or that buyers were required to pay cash "boot" to obtain more desirable lots of a size equal to their original lots. Amrep's tours and exchange privileges were effective in that they served to prevent most buyers from cancelling their land purchase contracts.

Amrep-drafted contracts were, according to evidence introduced at the hearings, rather onerous, in that the contract purchasers did not get possession of their land until they had completed their payments (usually five to eight years) and if they defaulted on any payment, even the very last one, Amrep had the contractual right to terminate the purchaser's interest in the land and keep all payments that had been made as "liquidated damages."

Based on the facts which are described above, the Administrative Law Judge (ALJ) issued a decision on July 18, 1979. It held that Amrep had engaged in unfair and deceptive conduct in connection with its sales of lots in its subdivisions. It also held that the "liquidated damages" clause in its form contracts was an illegal forfeiture clause. The ALJ also issued a proposed cease and desist order. This directed Amrep to stop making certain representations about its land, to make affirmative disclosures to past lot purchasers by means of a letter that was to be sent to

them, and to stop enforcing the illegal forfeiture clause in its form contracts. The full Commission affirmed the ALJ's decision in large part in an opinion issued November 2, 1983 and released February 8, 1984. The Commission also modified the proposed cease and desist order. This was in order to make its provisions consistent with requirements imposed by other federal statutes.

Amrep now asks this court to set aside the FTC's decision and order. Its attacks on the FTC's action fall into four categories: (1) attacks on the Commission's regulatory jurisdiction over land sales: (2) alleged procedural irregularities in the Commission's deliberations in this case; (3) alleged deficiencies in the evidence supporting the FTC's decision; and (4) attacks on the scope of the FTC's remedial order. These four categories will be addressed separately below.

The Commission's Regulatory Jurisdiction

Amrep contends that because Congress passed the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1701, *et seq.*, in 1968, the FTC no longer has jurisdiction to regulate interstate land sales. Its argument is based on the principle of statutory construction that when two statutes arguably apply to the same subject matter, the more specific statute applies to the exclusion of the general statute. Amrep asserts that in the ILSFDA, Congress set up a comprehensive and specific registration system and created the Office of Interstate Land Sales Registration (OILSR) within the Department of Housing and Urban Development to enforce it. Amrep concludes that therefore Congress must have intended to oust the FTC, with its more general regulatory mandate so as to prevent the use of unfair and deceptive trade practices in interstate commerce, and to prevent the FTC from using its jurisdiction to regulate interstate land sales.

We find no merit to Amrep's argument. In effect, Amrep is asking this court to find that Congress, by passing the ILSFDA in 1968, impliedly repealed the FTC's regulatory jurisdiction over

unfair trade practices that were connected with land sales operations. In asking us to so treat the statute, Amrep asks us to disregard "the cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976). We cannot disregard this principle, for, as we recently recognized:

> A specific statute controls over a general statute, *Morton* v. *Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974), but "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* at 551, 94 S.Ct. at 2483.

Pitzak v. *Office of Personnel Management*, 710 F.2d 1476, 1478-79 (10th Cir. 1983).

Our research does not reveal any clear indication of congressional intent to negate the FTC's jurisdiction over land sales frauds in the legislative history of the ILSFDA. In view of this we must reconcile the FTC Act and the ILSFDA and give effect to both statutes. This is not a difficult task. The ILSFDA's registration scheme applies to all interstate land sales operations and serves to provide consumers with a basic quantum of information on the operations. In those cases where a developer has used unfair or deceptive sales techniques in the past, however, the minimum levels of disclosures mandated by the ILSFDA may well be insufficient to protect consumers. In those cases the FTC Act comes into the picture. Pursuant to its mandate to extripate unfair or deceptive trade practices, the FTC may impose more stringent restrictions on conduct and higher disclosure requirements to prevent interstate land developers with bad records to refrain from continuing to use deceptive or unfair sales practices. Thus, the two statutes can be read in a fully consistent manner.

These two agencies must learn to cooperate. This is essential to their success.

The only potential problem with allowing both the OILSR and the FTC to regulate interstate land sales is that the FTC might impose duties on a land developer in a cease and desist order that are inconsistent with duties imposed by OILSR under the ILSFDA. It does not follow that this possible difficulty does bar recognition of full effect to both statutes. The FTC will unquestionably use the utmost care to avoid inconsistencies between its cease and desist orders and the ILSFDA's requirements.[3] If the Commission ever failed to do so, a reviewing court could exercise the power given to it by 15 U.S.C. § 45(c) to modify the FTC's order and eliminate the inconsistencies. Therefore, we conclude that the regulatory schemes created by the FTC Act and the ILSFDA are fully consistent. Thus, the FTC did have jurisdiction to maintain this complaint proceeding against Amrep.

The Commission's Procedures

Having found that the Commission has jurisdiction to regulate Amrep's land sales practices, we proceed to consider Amrep's attacks on the procedures that the Commission used in deciding this case.

First we consider Amrep's attack on the sufficiency of the Commission's original complaint. Amrep notes that the complaint contains specific references only to representations used in connection with marketing of its Rio Rancho Estates subdivision. It contends that since the complaint specifically refers only to Rio Rancho Estates, the Commission must not have had "reason to believe" that Amrep used unfair and deceptive trade practices in marketing lots in its Silver Springs Shores, Oakmont Shores, and El Dorado subdivisions at the time that it issued the complaint.

3. The Administrative Law Judge in this case in fact recommended an order that included some provisions inconsistent with the ILSFDA's requirements. The Commission recognized the potential problems with the ALJ's proposed order, however, and modified the inconsistent provisions of the order so that they tracked the ILSFDA's requirements.

It therefore concludes that the Commission's complaint fails to satisfy the mandate of 15 U.S.C. § 45(b) that the Commission have "reason to believe" that Amrep had engaged in unfair and deceptive trade practices with respect to its Silver Springs Shores, Oakmont Shores, and El Dorado subdivisions, and asks that this court vacate those portions of the FTC's decision and order pertaining to those subdivisions.

We fail to recognize merit in this argument. All that the law requires is that the FTC actually had some "reason to believe"—that is, that it has conducted an investigation—before it issued a complaint. *See, e.g., Standard Oil Company of California* v. *Federal Trade Commission*, 596 F.2d 1381, 1386 (9th Cir. 1979), *rev'd on other grounds*, 449 U.S. 232 (1980). Here the FTC had conducted an extensive, corporation-wide investigation of Amrep before it issued the complaint. It discovered that Amrep had used arguably unfair and deceptive trade practices (for example, its arbitrary price increases for lots) in connection with all four of its subdivisions, and it also found that Amrep had made certain deceptive representations that were specifically connected with Rio Rancho Estates. All of these discoveries were set forth in the averments of the Commission's complaint. Those averments are sufficient to indicate that the complaint was issued in full compliance with 15 U.S.C. § 45(b). It also serves to show the Commission had a well-grounded "reason to believe" that Amrep had engaged in unfair and deceptive trade practices in connection with its sales of lots in all of the listed subdivisions. *Cf. Federal Trade Commission* v. *Standard Oil Company of California*, 449 U.S. 232, 246-47, n.14 (1980).

Amrep next attacks the procedures that the Commission used in adopting its November 2, 1983 opinion and order. Although there are many facets to Amrep's attack, the key to its argument is its assertion that the Commission adopted a new legal standard for deciding whether a practice is deceptive before it issued the Amrep decision: that it subsequently erred by applying the old legal standard in the Amrep case.

Appendix "A"

Amrep argues that the Commission adopted new deception standard in an October 14, 1983 letter from its Chairman to Representative John Dingell, the Chairman of the House Committee on Energy and Commerce. Amrep suggests that that letter, which said that the Commission would find acts or practices to be deceptive if they were likely to mislead consumers acting reasonably under the circumstances, was a binding policy statement that superseded the Commission's earlier "tendency or capacity to mislead" test for deceptive trade practices. Amrep also contends that since the Commission's letter was a binding policy statement, the Commission could find Amrep's trade practices deceptive only if a majority of the Commissioners found the practices deceptive under the new "reasonable consumer" test. It contends that a majority of Commissioners never found Amrep's practices to be deceptive under the new test.

Amrep notes that the Commission's opinion applied the old "tendency or capacity" test. Two Commissioners joined fully in that opinion. Two other Commissioners issued a concurring statement saying Amrep's conduct would be found deceptive under either the old standard or the new. A fifth Commissioner issued a separate concurring statement indicating that he agreed with the result in the case, but stating that the better approach to deception cases is the "reasonable consumer" approach. This fifth Commissioner, David Clanton, had resigned from the Commission effective October 14, 1983. Accordingly, Amrep contends that his vote should not be counted in deciding whether a majority of the Commission had applied the new standard in its November 2, 1983 opinion. After subtracting Commissioner Clanton's vote, Amrep concludes that only two Commissioners concurred in finding Amrep's practices to be deceptive under the new test. Accordingly, Amrep asks that this court set aside the Commission's findings of deception because a valid Commission majority did not vote for them.

We reject Amrep's argument. As we recognized above, the key to Amrep's argument is its assertion that the FTC's October

14, 1983 letter to Representative Dingell was a policy statement that bound the Commission in all future cases. However, contrary to Amrep's assertions, the Commission's policy statement did not establish a binding norm that the Commission had to apply in all future cases.

It is elementary administrative law that in order for it to have binding force there are only two methods that an agency may use in formulating policy. It may establish binding policy either through rule-making procedures or through adjudications that create binding precedents. *Pacific Gas & Electric Co.* v. *Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974). General policy statements, such as the one at issue in this case, are the result of neither a formal rule-making proceeding nor an adjudication. They are merely public pronouncements of the policy that the agency plans to follow in rule-makings or adjudications. *Id.* Such policy statements have no more binding effect than press releases. It is only when a new standard set forth in a policy statement is adopted in a formal rule-making or adjudication that it becomes a binding norm which the agency must follow in future cases. *Id.*

The policy statement at issue in this case was neither the product of a formal rule-making nor the product of an adjudication. Accordingly, the Commission was not bound by it when it decided the Amrep case. It was only when the Commission adopted the standard set forth in the policy statement in a formal adjudication that the standard became the legal standard which the Commission had to apply in all future deception cases. *See Cliffdale Associates, Inc.*, 3 CCH Trade Reg. Rep. § 22,137 (1984). Thus, in the Amrep case, the Commission was free to use the old deception standard in evaluating Amrep's conduct. The Commission's opinion applied that standard and found that Amrep's conduct had been deceptive. A majority of the Commission

concurred in this finding. Accordingly, we affirm the Commission's finding that Amrep had engaged in deceptive trade practices.[4]

We now consider Amrep's final procedural argument. It asserts that the Commission's use of a written voting method in this case violated the Government in the Sunshine Act, 5 U.S.C. § 552b. Amrep argues that the Commission was bound to hold open meetings in this case because it involved controversial issues of general public policy (the possible adoption of a new deception standard), and that the Commission could not decide this case by notational voting on a proposed opinion that was circulated to Commissioners sequentially.

Once again Amrep's argument lacks merit. The Sunshine Act mandates only that, when an agency holds meetings, they must be open to the public. It does not require agencies to hold meetings, and it permits them to continue to do business by sequential or notational written voting. The D.C. Circuit recently stated:

> [An agency] has broad discretion to determine the procedures by which it conducts is business. The Sunshine Act does not require an agency to hold meetings in order to function. *Cf. Communications Systems, Inc.* v. *Federal Communications Commission,* 193 U.S. App. D.C. 412, 595 F.2d 797 (1979), where we noted that Congress intended to permit agencies to consider and act on agency business by circulating written proposals for sequential approval by individual agency members without formal meetings.

Pacific Legal Foundation v. *Council on Environmental Quality,* 636 F.2d 1259, 1266 (1980).

4. Because we find that the Commission could properly apply its old test for deception, and because an absolute majority of the Commission found Amrep's trade practices to be deceptive under that test, we need not reach Amrep's arguments concerning the validity of Commissioner Clanton's vote in this case.

Even if the Sunshine Act established a presumption that agencies should hold public meetings whenever practicable, the Act also contains an exception permitting agencies to hold meetings pertaining to formal adjudications in private. *See* 5 U.S.C. § 552b(c)(10). We believe that this statutory exception would apply in this case. Here, the Commission was specifically considering whether a single corporation, Amrep, had engaged in unfair and deceptive trade practices. In deciding whether Amrep had engaged in such practices, the FTC was required to act as a court, and, "[t]he evident sense of Congress [in adopting the Sunshine Act] was that when a statute required an agency to act as would a court, its deliberations should be protected from disclosure as a court's would be." *Time, Inc.* v. *United States Postal Service,* 667 F.2d 329, 334 (2d Cir. 1981). We conclude that the Sunshine Act is not applicable in this case, and accordingly reject Amrep's argument.

The Evidence Supported the Commission's Decision

Having found the procedures used in this case to be adequate, we now turn to Amrep's attacks on the sufficiency of the evidence supporting the Commission's decision. In considering its arguments, we bear in mind that the FTC Act makes the Commission's factual findings conclusive in this review proceeding as long as they are supported by evidence. *See* 15 U.S.C. § 45(c). Thus, we must affirm the Commission's decision as long as it is supported by sufficient evidence to permit a reasonable mind to accept the Commission's conclusion. *Wyoming Bancorp* v. *Board of Governors of Federal Reserve System,* 729 F.2d 687, 691 (10th Cir. 1984).

Amrep's attack on the evidence supporting the Commission's decision is little more than quibbling with the methodology of the studies that the Commission used to determine the investment value of lots in Amrep's subdivisions. Amrep does not attack most of the Commission's factual findings, including its findings that Amrep used unfair high-pressure sales tactics, made false

investment representations (for example, its representations about constraints on the directions in which Albuquerque could grow) and used an illegal forfeiture clause in its form contracts. A review of the record reveals that these unchallenged findings are supported by a substantial quantity of evidence. A review also convinces us that even if we assume that Amrep's attacks on the Commission's investment value studies are correct, the errors that Amrep alleges are so trivial in the context of this case as a whole that they would not warrant a different result. *See Wyoming Bancorp,* 729 F.2d at 691, n.4. The record as a whole contains substantial evidence in support of the Commission's conclusion that Amrep had engaged in a systematic pattern of unfair and deceptive conduct. This evidence being sufficient as a whole, our ruling is that the Commission's decision is affirmed.

The Commission's Remedial Order

We finally consider Amrep's arguments that the Commission's remedial order was too broad. We have concluded that it is not. The Commission has broad discretionary authority to remedy unfair trade practices. *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 429-31 (1952); *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 612-13 (1946). We may not "lightly modify" an FTC order, and must uphold such an order if its provisions bear a "reasonable relationship" to the violations found and are not too indefinite. *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965). As discussed more fully below, we find that the Commission's order does bear a reasonable relationship to Amrep's past unfair and deceptive trade practices and affirm it in all respects.

Amrep's first argument is that when the Commission ordered Amrep not to enforce the illegal forfeiture clause contained in its form contracts, it effectively reformed Amrep's existing contracts. It argues that such a remedy exceeds the Commission's remedial authority, citing *Heater* v. *Federal Trade Commission,* 503 F.2d 321 (9th Cir. 1974).

Heater stands only for the proposition that the Commission cannot order retroactive private relief (*e.g.*, restitutionary relief or rescission of a contract) in a cease and desist order. It does not impede the Commission from forbidding the enforcement of illegal contracts. If it did the Commission would be stripped of power. The Supreme Court has upheld the Commission's power to order respondents in proceedings before it not to enforce illegal contracts. *See, e.g., Atlantic Refining Company* v. *Federal Trade Commission,* 381 U.S. 357, 372, 375-77 (1965). The Commission's order in this case falls squarely within the ambit of the *Atlantic Refining* holding. The Commission's order does not order Amrep to repay monies to past lot purchasers; it operates only prospectively, and merely prevents Amrep from continuing to profit from its inclusion of an illegal forfeiture clause in its past contracts. Accordingly, we find this portion of the Commission's order to be a proper exercise of its broad remedial discretion, *see Federal Trade Commission* v. *National Lead Co.,* 352 U.S. at 428-29, and affirm it.

Amrep's second argument asserts that the Commission's order that Amrep make affirmative disclosures to past and prospective lot purchasers exceeds its remedial authority. FTC orders requiring affirmative disclosures and corrective advertising have often been sustained by the courts. *See, e.g., Warner-Lambert Co.* v. *Federal Trade Commission,* 562 F.2d 749, 756 (D.C. Cir. 1977) (corrective advertising designed to correct misinformation given to past buyers), *cert. denied,* 435 U.S. 950 (1978); *see also Grolier, Inc.* v. *Federal Trade Commission,* 699 F.2d 983 (9th Cir.) (mandatory disclosures to prospective book purchasers), *cert. denied,* 104 S.Ct. 235 (1983); *Encyclopedia Britannica, Inc.* v. *Federal Trade Commission,* 605 F.2d 964 (7th Cir. 1979) (same), *cert. denied,* 445 U.S. 934 (1980). Here, the FTC has merely ordered Amrep to make affirmative disclosures designed to dissipate any misimpressions that purchasers might have as a result of Amrep's promotional tactics. We find this portion of the order to be reasonably related to Amrep's past violations and

practices, *see Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. at 392, and affirm it.

Finally, Amrep contends that it has changed its line of business from sales of undeveloped lots to the general public to sales of developed lots (lots served by utilities) to the public. It argues that application of the FTC's remedial order to its new business exceeds the scope of the complaint and the violations that the Commission found. Amrep would have the courts refrain from the exercise of powers Congress has authorized. To so rule would result in the agency having no authority in the old or new line.

We find Amrep's argument to be without merit. FTC remedial orders may cover acts and practices other than those that were initially the subject of the Commission's complaint. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952), or products other than those that were the subject of the original complaint, *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 676 F.2d 385, 391 (9th Cir. 1982), when such broad proscriptions are necessary to prevent law violators from circumventing the Commission's orders. In this case, the Commission's order is designed to "fence in" Amrep, *see FTC* v. *National Lead*, 352 U.S. at 431, and to prevent it from using new variants on its past unfair and deceptive tactics to unjustly enrich itself at the expense of consumers. It is a reasonable exercise of the Commission's remedial authority and we affirm it.

Conclusion

Our holding is that the Federal Trade Commission had jurisdiction to investigate and carry out the powers which the Congress gave it. It did not exceed any such powers. That which was exercised was supported by substantial evidence. Its order is a reasonable and proper exercise of its remedial authority.

We affirm the Commission's decision and order in all respects, and, pursuant to 15 U.S.C. § 45(c), order that it be enforced.

[Entered July 25, 1985]

APPENDIX "B"

(Final Order and Opinion of Federal Trade Commission)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 9018

Commissioners:

JAMES C. MILLER III, Chairman
MICHAEL PERTSCHUK
PATRICIA P. BAILEY
GEORGE W. DOUGLAS

In the Matter of

AMREP CORPORATION,
a corporation.

FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondent's counsel from the initial decision and upon briefs and oral argument in support of and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted each appeal in part and denied each in part. Therefore,

IT IS ORDERED that the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission except as otherwise inconsistent with the attached Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED, that the following Order to Cease and Desist be entered:

Appendix "B"

ORDER

I.

IT IS ORDERED that for the purposes of this Order the following definition shall apply:

A. "Property Report" shall mean any and all documents providing information regarding the purchase of land in general or a specific subdivision in particular which are required by federal or state law to be distributed to prospective purchasers or purchasers of land.

B. "AMREP Corporation" or "respondent" shall mean the corporate respondent, its successors and assigns, its officers, directors, agents, representatives and employees, acting directly or through any corporate subsidiary, division, or other device; provided, however, that pursuant to the Commission's Order of September 30, 1982, nothing in this Order shall be deemed to apply to General Development Corporation as a result of its purchase of property at Silver Springs Shores from AMREP Corporation.

C. "Land," "property" or "lot" shall mean any real property unimproved by a commercial or residential building sold or offered for sale by respondent.

D. "Vacant land," "vacant property" and "vacant lot" shall mean any land which is not a "homesite," as that term is defined in this Order.

E. "Homesite" or "building lot" shall mean any lot in which (1) potable water is available at a reasonable cost; (2) the lot is suitable for a septic tank operation or there is reasonable assurance that the lot can be served by a central sewage system; (3) the lot is legally accessible; and (4) the lot is free from periodic flooding.

F. "Purchaser" or "buyer" shall mean any individual who is a potential or actual vendee of the property being offered for sale or sold by respondent.

G. As used in this Order, a requirement to cease and desist from representing or misrepresenting shall include representing,

or misrepresenting, directly or by implication, and by any manner or means.

II

IT IS ORDERED that respondent AMREP Corporation, in connection with the advertising, sale, offering for sale, contracting, or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do cease and desist from:

A. Representing that:

1. The purchase of any land has been a good, profitable, safe or sound investment;
2. The demand for, or market value of, any land has increased;
3. The resale of any land has not been or is not difficult;

unless such representation is true and is not misleading, and unless, at the time such representation is made, respondent possesses and relies upon competent and reliable data which substantiates the representation, including, at a minimum, data of individual resales (including all resales and attempts to resell which are either known, or with the exercise of reasonable diligence, should be known, to respondent) of similar land (land with the same characteristics and degree of development) within the particular subdivision which are sufficient to demonstrate that the typical owner of such land is likely to have achieved the results represented.

B. Representing that:

1. The resale of any land is not likely to be difficult;
2. The supply of land available to meet present or future demand is likely to be limited for any reason;
3. The demand for, or market value of, any land is likely to increase;

Appendix "B"

4. Development (including residential development) of any land is likely to occur within a certain period of time;
5. The price set by respondent for any land is approximately equal to the fair market value of such land;

unless, at the time such representation is made: (1) the competent and reliable evidence reasonably available to respondent would be generally accepted by the community of experts qualified to make such representations as providing a reasonable basis for the projection; (2) respondent possesses and relies upon such data for its representation, which data respondent shall make available for inspection by any buyer on request; and (3) respondent provides the buyer with a copy of a written statement containing the representation and disclosing the material bases and assumptions therefor, and disclosing the buyer's right to inspect respondent's substantiating data on request.

C. Misrepresenting:

1. The legal ramifications of signing a contract, through any means including, but not limited to, making representations that the buyer is only making a deposit, is only reserving the land, is only taking the first step, or is not making a final decision;
2. The market value, or change in market value, of any land;
3. Population data, the direction of population growth, or other geographic or demographic data or trends;
4. Characteristics of investments of any sort, including stocks; the stock, commodity or options market; savings account or certificates; annuities; or land as an investment;
5. The purchase, reservation, contracting or consideration by any individual other than the immediate buyer, of any land, through means including, but not

limited to, references to anyone else "holding" a piece of property or "deleting" a listing;

6. Respondent's reputation, size, assets, or listing on any stock exchange;
7. The present, planned, proposed or potential development of any land by anyone other than respondent;
8. The true nature and purpose of any promotional event or activity, including, but not limited to, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sight-seeing tours.

D. Engaging in the following acts or practices:

1. Discouraging buyers from obtaining the assistance of counsel or other professional or personal advice in connection with the purchase decision or the purchase of respondent's land;
2. Failing to provide any property report before the customer signs a contract;
3. Filling out a contract with a purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he or she desires to purchase the land being offered;
4. Subjecting a purchaser who has evidenced a desire not to purchase respondent's land to continued sales efforts from any sales representative or other employee other than the original sales person, i.e., any institution of a "T.O." or "takeover" system;
5. Making any statement or representation concerning the rights or obligations of respondent or the purchaser, or concerning the present, planned, or potential development, improvement, or facilities of the particular land being offered or of the unit, subdivision or project in which the offered land is located,

which differs in any material respect from the contract of sale, the property report or the Notice to Buyers;

6. Including in any contract, language permitting the respondent to retain any sums paid by the buyer in excess of the amount permitted to be retained by Section IV(F) of this Order upon the failure of buyer to pay any installment due or to otherwise perform any obligation under the contract.
7. Representing that a lot is a homesite or a building lot if the lot is not a "homesite" as defined in this Order;

III.

[NOTICE TO BUYERS; PROMOTIONAL MATERIALS DISCLOSURES]

IT IS FURTHER ORDERED that respondent AMREP Corporation, in connection with the advertising, sale, offering for sale, contracting or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall:

A. Distribute to all purchasers a copy of the following "Notice to Buyers" at least two days prior to any in-person sales contact; provided, however, that in cases where the initial contact is in person (as, for example, at a booth located in a public place), respondent shall give the Notice to the buyer at the commencement of any sales presentation, request that the purchaser read it, and not interrupt the reading thereof by any purchaser. Respondent shall also include the Notice with any mailing which invites the purchaser to attend a meeting sponsored by respondent. The Notice shall be on a separate sheet of paper and shall contain only the required information and no other writing unless approved in advance by the Commission. The Notice shall be in the following format and content:

Appendix "B"

NOTICE TO BUYERS
NAME OF SUBDIVISION:
NAME OF DEVELOPER:
EFFECTIVE DATE OF NOTICE:

WE ARE OFFERING LAND FOR SALE IN THE STATE OF _____, _____MILES FROM THE CITY OF _____. THE AVERAGE LIST PRICE FOR THE LOTS BEING OFFERED IS $_____, FOR AN AVERAGE SIZE LOT OF _____ ACRE(S), WHICH IS A COST PER ACRE OF $_____.

IMPORTANT

DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. THE FUTURE VALUE OF LAND IS UNCERTAIN AND MAY HAVE NO RELATION TO OUR SALES PRICE, WHICH IS SET BY US.

[State the number of lots sold in the subdivision by the developer from the *initial sale* to the date of this Notice, or through the end of the second most recent complete month preceding the date of the Notice. State the number of unsold lots currently available for sale. State the number of lots that the developer intends to offer in the future to complete sales in the subdivision.]

PERSONAL INSPECTION OF ANY LAND PURCHASE IS DESIRABLE. WE RECOMMEND THAT YOU VISIT ANY PROPERTY YOU PURCHASE. YOU SHOULD TAKE THE TIME DURING YOUR INSPECTION TO VISIT THE LOCAL AREA AND EXAMINE THE REAL ESTATE MARKET.

[The following warning set off by a box outline:]

IMPORTANT: OBTAIN AND READ THOROUGHLY EACH PROPERTY REPORT AND

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CONTRACT BEFORE SIGNING ANYTHING. THE PROPERTY REPORT CONTAINS INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE YOU SIGN A CONTRACT TO BUY THIS LAND. IT IS DESIRABLE TO HAVE A QUALIFIED PROFESSIONAL EVALUATE THIS PURCHASE *BEFORE* YOU SIGN ANYTHING.

B. Include clearly and conspicuously in all written promotional materials and advertisements, the following statement:

> Do not count on your lot rising in value or your being able to resell it. The future value of land is very uncertain, and may have no relation to the sales price, which is set by the seller.

C. Include clearly and conspicuously in all promotional materials not covered by section III (B) of this Order, including all radio and television commercials, the following statement:

> Get the property report required by federal law. Read it carefully before signing anything.

IV.
[SALES CONTRACT]

IT IS FURTHER ORDERED that respondent AMREP Corporation, in connection with the advertising, sale, offering for sale, contracting or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall:

A. Set forth on the top of the first page of the contract used to sell respondent's land in 24-point boldface type, "CONTRACT FOR THE PURCHASE OF LAND." No other heading or description of the purpose of the document shall appear.

B. Include clearly and conspicuously, immediately preceding the space provided for the purchaser's signature in each contract for the sale of land, the following statement in 12-point boldface type:

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SEVEN DAY RIGHT TO CANCEL

YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY FOLLOWING THE SIGNING OF THE CONTRACT.

IF YOU CANCEL WITHIN THIS TIME, WE WILL REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT, AND CANCEL AND RETURN THIS CONTRACT, WITHIN THIRTY DAYS AFTER RECEIPT OF YOUR NOTICE.

NO SALES REPRESENTATIVE WILL CONTACT YOU DURING THESE SEVEN DAYS. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN 30 DAYS OF ITS OCCURRENCE, YOU WILL HAVE 45 DAYS FROM THE DATE OF PURCHASE TO CANCEL THIS CONTRACT.

RIGHT TO CANCEL AFTER PROPERTY INSPECTION

IF YOU HAVE NEVER VISITED THE PROPERTY, YOU HAVE AN ADDITIONAL RIGHT TO CANCEL THIS CONTRACT, BUT ONLY IF YOU VISIT THE PROPERTY WITHIN SIX MONTHS. YOU HAVE UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER THE CONCLUSION OF YOUR IN-PERSON INSPECTION IN WHICH TO NOTIFY THE SELLER OF A DECISION TO CANCEL. IF YOU CANCEL WITHIN THIS TIME, WE WILL REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT, AND CANCEL

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AND RETURN THIS CONTRACT, WITHIN 30 DAYS.

NO SALES REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU DURING THIS SEVEN DAY PERIOD. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN TEN DAYS OF ITS OCCURRENCE, YOU WILL HAVE 30 DAYS FROM THE DATE OF YOUR VISIT TO CANCEL THIS CONTRACT.

IMPORTANT:

WE RECOMMEND THAT BEFORE SIGNING, YOU CAREFULLY EXAMINE THIS CONTRACT AND THE PROPERTY REPORT AND HAVE THEM REVIEWED BY A QUALIFIED PROFESSIONAL.

Provided, however, that in the event that any state or federal law or regulation requires that another statement immediately precede the space provided for the buyer's signature, the statement required herein may precede any such statement.

Provided, further, that during this seven day period after the signing of a land purchase contract, respondent shall not initiate any sales-related contact with the purchaser. Any such contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at the purchaser's option, exercisable at any time before the expiration of 45 days from the date of purchase, but only if the customer notifies respondent of the contact within thirty days after its occurrence. Respondent shall investigate any notification received from buyers of contact violating the provisions of Part IV(B) above, and comply with the requirements of Part VI(F) of this Order. This provision shall not preclude respondent from initiating contacts solely for the purpose of determining compliance with this Order.

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Provided that, nothing in this Order shall prevent respondent from offering a cancellation period greater than seven days.

C. Honor any signed and timely Notice of Cancellation by Buyer (or its functional equivalent) and, within 30 days after the receipt of such notice, (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the buyer.

D. Include in all contracts of sale, if respondent represents in any manner that it will provide or complete roads of facilities for water, sewer, gas, electric service or recreational amenities, a provision which expressly obligates respondent to provide or complete such roads, facilities, or amenities.

E. Include in all contracts for the sale of land, a provision requiring respondent to refund to the buyer, in the event of the buyer's default under the contract, all monies paid under the contract (excluding interest, taxes and assessments), less either: (1) 15% of the cash sales price of the lot shown on the contract, or (2) the actual damages incurred by respondent resulting from the buyer's default as determined by the law of the jurisdiction governing the contract, whichever is greater.

F. Refund to buyers who purchase after the effective date of this Order and who are deemed in default, within 60 days after the buyer is deemed to have defaulted, all monies paid under the contract (excluding interest, taxes and assessments), less either: (1) 15% of the cash sales price of the lot shown on the contract; or (2) the actual damages incurred by respondent resulting from the buyer's default, as determined by the law of the jurisdiction governing the contract, whichever is greater; provided, however, that this paragraph shall not preclude respondent from offering a defaulting buyer additional alternatives which may be selected at the buyer's option, in lieu of a refund. For the purposes of this paragraph, a buyer shall be deemed to have defaulted when either (a) the buyer notifies the respondent of his or her intent to

default, or (b) the buyer has failed to make a payment for a period of two months from the due date of such payment; provided, however, that this provision shall not prohibit respondent from granting any purchaser an extension of time within which to make payments.

V.

[MISCELLANEOUS PROVISIONS]

IT IS FURTHER ORDERED that respondent AMREP Corporation, in connection with the advertising, sale, offering for sale, contracting or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall:

A. [EXCHANGE PRIVILEGE] Whenever respondent extends a privilege or right whereby the buyer may exchange buyer's undeveloped land for a building lot of "equal value" or similar terms, include in all materials, including the contract, which discuss the privilege or right, or if such privilege or right is described orally, in a concurrently delivered written notice, the following statement:

> BUILDING EXCHANGE LOTS MAY BE SMALLER IN SIZE AND MAY REQUIRE YOU TO PAY MORE MONEY THAN YOU ARE NOW CONTRACTING TO PAY.
>
> [State the specific financial terms or formula for exchange of the buyer's equity in the original lot into the building lot]

B. [VISITATION; CANCELLATION RIGHT] Whenever respondent sells property to a purchaser who has never seen the property before executing a contract for the purchase thereof, respondent shall

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1. Extend a refund privilege conditioned upon the purchaser making a personal visit to the property within 180 days after the purchase and notifying respondent within seven days after inspection that a refund is desired;

2. Provide such purchaser seven days after making the personal inspection within which to request a refund;

3. Ensure that every buyer who seeks to make this inspection visit sees the precise lot identified in buyer's contract;

4. Furnish such purchaser, at the conclusion of the inspection visit, with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION", which shall contain in boldface type of a minimum size of 10 points the following statements:

NOTICE OF CANCELLATION AFTER INSPECTION

Date of conclusion of inspection tour of property:

Lot identification:

Name of Customer:

You may cancel your contract without any penalty or obligation, at any time prior to midnight of the seventh day after the above date. No sales representative of the seller should contact you on behalf of the seller during this seven day period. If a sales representative contacts you and you notify us of the contact within ten days of its occurrence, you will have 30 days from the date of your visit to cancel the contract. (This right is in addition to other cancellation rights you have under your contract.)

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If you cancel, we will send you a full refund within 30 days.

To cancel your contract, mail or deliver a signed copy of this cancellation notice (or any other written notice), or send a telegram to (name of respondent, at address of respondent's place of business), postmarked not later than midnight of _____ .

I (WE) HEREBY CANCEL THE ABOVE-DESCRIBED CONTRACT. (EACH BUYER MUST SIGN THIS NOTICE)

_____

(Date)

_____

(Buyer(s)' signature)

The visit shall be deemed to conclude (a) after the buyer has inspected the precise lot contracted for, and (b) at the end point in the visit or tour when all contact with the buyer by any employee or representative of respondent terminates.

5. Before furnishing the buyer copies of the "Notice of Cancellation After Inspection" set forth in Paragraph B(4) above, complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property; the name of the customer and the date, not earlier than the seventh day following the conclusion of the inspection, by which the buyer may cancel the purchase.

6. During the post inspection cancellation period, refrain from initiating any sales related contact with the purchaser. Any such initiation of contact shall be grounds for rescission of the purchase contract and recovery of

all payments thereunder at the purchaser's option, exercisable any time before the expiration of thirty days from the date of the conclusion of the visit, but only if the customer notifies respondent of the contact within ten days of its occurrence. This provision shall not preclude respondent from initiating contacts solely for the purpose of determining compliance with this Order.

7. Investigate any notification received from buyers of contact violating the provisions of Part V(B)(6) above, and comply with the requirements of Part VI(F) of this Order.

8. Honor any signed and timely Notice of Cancellation after Inspection (or its functional equivalent) and, within 30 days after the receipt of such notice, (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

C. [BAR TO RECOVERY FROM BUYERS IN DEFAULT] Forbear from seeking to recover, or recovering by any means, from buyers who were under contract before the date this Order becomes final for the purchase of land at Rio Rancho Estates, Silver Springs Shores, Oakmont Shores, and Eldorado at Santa Fe, and who have defaulted or who become in default, any sums remaining due on their contract.

D. [FORFEITURE CLAUSE] Forbear from using or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any purchaser, a contract clause which provides that the seller may retain all sums previously paid by the buyer in the event that the buyer fails to pay any installment due or otherwise to perform any obligation under the contract.

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E. [WAIVER OF RIGHT TO CANCEL] Not misrepresent, nor solicit nor obtain the buyer's assent to or otherwise impose any condition, waiver, or limitation upon, the right of a buyer to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation.

VI.

IT IS FURTHER ORDERED that respondent AMREP Corporation, shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future sales representatives and other employees, independent brokers, advertising agencies and others who sell or promote the sale of respondent's land;

B. Provide each person so described in paragraph (A) above with a form to be returned to respondent, clearly stating each person's intention to conform his or her business practices to the requirements of this Order;

C. Inform each person described in paragraph (A) above that respondent shall not use the services of any such person, unless such person agrees to and does file notice with respondent that he or she will conform his or her business practices to the requirements of this Order;

D. In the event such person will not agree to so file notice with respondent and to conform his or her business practices to the requirements of this Order, respondent shall not use the services of such person;

E. Inform the persons described in paragraph (A) above that respondent is obligated by this Order to discontinue dealing with those persons who engage on their own in the acts of practices prohibited by this Order or who fail to adhere to the affirmative requirements of this Order;

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F. Institute a reasonable program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in paragraph (A) above conform to the requirements of this Order, and promptly investigate and make good faith efforts to resolve any complaints about such persons received by respondent, and maintain records of any such complaint, investigation and disposition for ten years from the date of the complaint;

G. Discontinue dealing with any person described in paragraph (A) above, revealed by the aforesaid program of surveillance, who more than once engages on his or her own in the acts or practices prohibited by this Order; *provided, however,* that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondent in any proceeding brought to recover penalties for alleged violation of any paragraph of this Order;

H. Forthwith distribute a copy of this Order to each of its subsidiaries;

I. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, reorganization or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order;

J. Within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail manner and form in which it has complied with this Order.

K. Mail to all buyers who were under contract before the final date of this Order for the purchase of land at Silver Springs Shores, Rio Rancho Estates, and Oakmont Shores, regardless of whether or not they are in default, the Notice attached to this Order as Appendix A.

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Complaint paragraphs 32-33, 34-35, 36-37, 42-43, 44-45, 46, 47, 50, 51-53, and 56 (to the extent it refers to unfair methods of competition) are hereby dismissed.

By the Commission.

SEAL

/s/ Elizabeth O. Williard
Acting Secretary

Dated: November 2, 1983
ATTACHMENT: Concurring Statement of Chairman Miller
[Entered February 7, 1984]

Appendix "B"

APPENDIX A

IMPORTANT NOTICE TO LOT BUYERS IN
(insert RIO RANCHO, SILVER SPRINGS SHORES,
or OAKMONT SHORES)

Dear Customer:

We are sending this letter to you under an order issued by the Federal Trade Commission. It contains facts you should know about your purchase.

In 1975, the Federal Trade Commission brought a lawsuit against AMREP Corporation, the parent company of (insert subdivision). This letter is part of the order issued when the lawsuit was decided. A copy of that Order is enclosed.

Please read this letter carefully and consider the alternatives suggested in Part II. We cannot advise you as to what decision is best for you.

I. LOT VALUE AND RESALE

There is virtually no resale market for lots which have not been developed with utilities. If your lot is presently undeveloped, it is unlikely that you would be able to resell it now except at a substantial loss. The extent of community development and population growth in the particular area of (insert subdivision) where your lot is located will determine whether or not you could resell your lot once it is developed. The population growth and community development necessary to enable you to sell your lot at or near the price you paid or are paying for it may not occur for many years, if at all. If the lot may be exchanged for a developed lot, there may be some small demand by builders for a limited amount of such lots at the present time.

You should be aware that neither AMREP nor (insert subdivision) will buy back your lot or help you resell it.

II. OPTIONS AVAILABLE TO PURCHASERS

There are a number of options available to you at this time.

1. You can continue making your payments.

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2. You can refuse to make any further payments. According to the FTC Order you *cannot* be required to pay any more money, but if you elect this option, you will lose your land and all of the money you have paid.

   In addition, if you purchased your lot as an investment and not for your own use as a homesite, you might be able to declare any money you lost as a tax loss, deductible from your income on federal and state tax returns. It is suggested strongly that you contact your tax advisor or local District Director of the Internal Revenue Service before deciding whether to stop payments, if your decision is based on the possibility of taking a tax loss. Whether your loss is deductible will be based on your specific situation and you should not rely on this letter as authority for a deduction.
3. You can stop making payments and seek satisfaction against AMREP in a private lawsuit. You should consult an attorney before electing this option. The Commission's Order may be relevant in such a suit.
4. You may be able to relocate to (insert subdivision) and build on your lot or exchange for a building lot if so permitted by your contract or by company policy. You may, however, be required to pay more money for this exchange lot. Check with your contract for details.
5. The Federal Trade Commission may consider bringing an action against AMREP to provide refunds or other relief for past purchasers. For additional information, you should contact the Federal Trade Commission, 11000 Wilshire Boulevard, Los Angeles, California 90024.

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If you have questions about this letter, please write to us at the following address:

[Insert Respondent's Address]

In any letter, you should include your name as set forth in your contract, your account number, your lot identification number, your current address and telephone number, and the name of the subdivision in which your lot is located.

Sincerely,

President

AMREP Corporation

Appendix "B"

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 9018

Commissioners:

JAMES C. MILLER III, CHAIRMAN
MICHAEL PERTSCHUK
PATRICIA P. BAILEY
GEORGE W. DOUGLAS

In the Matter of
AMREP CORPORATION,
a corporation,

OPINION OF THE COMMISSION*

By PERTSCHUK, *Commissioner:*

I. *Background*

The respondent, AMREP Corporation, is a land sales company incorporated under the laws of the state of Oklahoma. Its principal place of business is New York, New York. AMREP and its 37 wholly-owned subsidiaries in 24 states have acquired and subdivided several large parcels of undeveloped land. Core areas within each subdivision have been developed with residential homes while the vast majority of lots remain undeveloped with the exception of unpaved roads. At the time of the issuance of this

* Prior to his resignation on October 14, 1983, Commissioner Clanton recorded his vote in the affirmative for the Commission's Opinion, and issued the following statement:

"I completely agree with the result in this case. There is little doubt that respondents have violated the law. On the issue of the proper deception standard, I share the Chairman's view that the better approach to interpreting ad claims is one of reasonableness. The Commission has applied this concept in several recent advertising cases, *e.g.*, *American Home Products*, 98 F.T.C. 136 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers*, D. 8917 (July 5, 1983); *Sterling Drug, Inc.*, D. 8919 (July 5, 1983), and I believe that concept provides an objective understandable standard for future applications."

complaint, respondent and its subsidiaries were in the business of selling these undeveloped lots to the public, sight unseen, to be held primarily for investment purposes.

The subdivisions involved in this action are: Rio Rancho Estates, near Albuquerque, New Mexico; Silver Springs Shores near Ocala, Florida; Eldorado at Santa Fe, New Mexico; and Oakmont Shores in southwestern Missouri. These subdivisions include a vast amount of territory. Rio Rancho Estates, by far the largest of respondent's subdivisions, contains 91,000 acres of land, approximately 142 square miles, an area nearly twice the size of the City of Albuquerque. (I.D.15)[1]The other three subdivisions contain respectively: Silver Springs Shores, 18,500 acres (I.D. 33); Eldorado at Santa Fe, 6,000 acres (I.D. 42); and Oakmont Shores, 3,500 acres. (I.D. 47) Respondent had sold approximately 95,000 lots by April, 1976. More than 75,000 of those lots were sold at Rio Rancho Estates alone. (I.D. 18, 35, 43, 48)

Respondent marketed its properties principally in cities and towns far from the sites of its subdivisions, by use of national advertising and dinner parties given for prospective buyers in their home towns. Most purchasers bought their property based on point of sale representations made by respondent in promotional pamphlets, slides, movies, speeches and sales presentations.

1. The following abbreviations will be used in this opinion:

I.D.	—Initial Decision findings number
I.D.p.	—Initial Decision page number
Tr.	—Transcript page number
CX	—Complaint Counsel's exhibit number
RX	—Respondent's exhibit number
CTX	—Court exhibit number
RAB	—Respondent's appeal brief
CAB	—Complaint Counsel's appeal brief
R. Ans	—Respondent's answering brief
C. Ans	—Complaint Counsel's answering brief
R. Rep	—Respondent's reply brief
C. Rep	—Complaint Counsel's reply brief
RPF	—Respondent's proposed findings
CPF	—Complaint Counsel's proposed findings

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The complaint alleges that during its marketing presentations respondent engaged in unfair or deceptive acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (FTC Act or Section 5), by making false and misleading representations to prospective buyers, by failing to disclose material facts and by using unfair contractual provisions in its land sales contracts. The gravamen of the complaint is contained in paragraphs 11 and 12 which allege that respondent represented directly and by implication that the lots it offered for sale were investments which would realize significant monetary gain and which involved little or no financial risks, when, in fact, the lots were poor investments which involved substantial financial risks to purchasers. The remaining paragraphs of the complaint allege that respondent made numerous specific misrepresentations in marketing its property as a high-yield, low-risk investment, used unfair contractual provisions, and engaged in other unfair and deceptive sales practices.

The complaint was issued on March 11, 1975. Hearings were begun on June 1, 1976, and continued through July 30, 1976, when they were suspended on order of the Second Circuit Court of Appeals pending completion of the criminal trial against respondent and several of its officers in the U.S. District Court for the Southern District of New York. *Amrep Corp.* v. *United States,* 405 F. Supp. 1053 (S.D.N.Y.), *aff'd,* 535 F.2d 1240 (2d Cir. 1976). On March 10, 1977, following a jury verdict, a judgment of conviction for mail fraud and interstate land sales fraud was entered against respondent and certain of its officers. That judgment was affirmed on appeal. *U.S.* v. *Amrep Corp.,* 560 F. 2d 539 (2d Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978).

Hearings in the Commission proceedings resumed in May 1977 and continued through May 1978. The record was closed on May 31, 1978, after hearings were conducted in Albuquerque, New York City, Los Angles, Ocala, Florida, and Springfield, Missouri. The record in this proceeding is extensive, including approximately 25,000 pages of testimony and 1,500 accepted exhibits.

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(I.D. p. 20) On July 18, 1979, Administrative Law Judge Paul R. Teetor issued an Initial Decision finding that respondent's misrepresentations concerning the growth, development and investment potential of its properties were unfair methods of competition and unfair and deceptive acts and practices in violation of Section 5. (I.D. pp. 265-68) In addition, he found that respondent's high pressure sales techniques, employed in the context of respondent's misrepresentations about the value of the property it was marketing, constituted unfair methods of competition and unfair and deceptive acts and practices in violation of Section 5. (I.D. pp. 264-65) Finally, Judge Teetor found that four of the provisions of respondent's standard form sales contract constituted unfair methods of competition and unfair acts and practices in violation of Section 5. (I.D. pp. 268-70)

The ALJ's order provides for broad relief. Among other things, it prohibits respondent from making representations that its land is a good financial investment and from engaging in certain "hard sell" tactics. It requires respondent to make affirmative disclosures prior to any sales presentation warning potential customers that several of its officers were convicted in federal court for mail fraud in connnection with the sale of land, and informing them of the existence of future plans, if any, for installation of roads, water, sewer, electric, telephone, and recreational facilities. The order also requires a ten-day cooling-off period after any sale during which no company-initiated contacts are permitted. Finally, the ALJ ordered respondent to stop using and enforcing several clauses in its sales contract which he found to be unfair.

Respondent appealed from the Initial Decision on numerous grounds, including arguments that: the Commission lacked jurisdiction; Judge Teetor had demonstrated personal bias by failing to consider evidence favorable to respondent; the weight of the evidence was insufficient to support a find of liability; Judge Teetor had made numerous improper procedural and evidentiary rulings; the scope of the order was unduly restrictive and burdensome; and compliance with some of the order's requirements

would conflict with respondent's legal duties under the Interstate Land Sales Full Disclosure Act.[2] Complaint counsel cross appealed, arguing that the Commission should expand the Order to include a conditional ban on respondent's future sales of undeveloped lots and a requirement that respondent establish a resale program for current lot owners. Having reviewed the record as a whole, the Commission upholds Judge Teetor's findings that respondent has violated Section 5 in several respects. While on some limited points we reverse the ALJ, we generally concur in the Initial Decision.[3] In particular, we find the record evidence sufficient to support his critical holding that respondent marketed its undeveloped lots as excellent, low-risk investments[4] when in fact those lots were poor investments and represented substantial financial risks to the purchasers. Below, the Commission rejects respondent's argument that we lack jurisdiction. We then discuss various representations made by respondent that relate to the investment value of its properties,[5] and explore whether those

2. Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1700 et. seq. (1979).

3. Paragraph 56 of the complaint alleged that all of the various acts and practices enumerated in the complaint injured respondent's competitors and constituted unfair methods of competition in or affecting commerce in violation of Section 5. Without discussion, the ALJ concluded that respondent's misrepresentations, high-pressure tactics, and unfair contractual clauses all constituted unfair methods of competition in violation of Section 5. (I.D. pp. 264-270.)

Neither respondent nor complaint counsel have briefed the issue of how respondent's conduct is alleged to have injured competition. The ALJ's opinion is devoid of any discussion on the issue. In the absence of sufficient evidence in the record and discussion in the briefs, we cannot sustain the ALJ's holding that respondent's conduct also constituted unfair methods of competition and accordingly we dismiss those portions of the complaint.

4. While respondent did not, in most cases, use the specific term "excellent" in describing the investment value of its properties, the Commission in the complaint and in this Opinion uses the term "excellent investment" to mean an investment that has the characteristics of high yield, certainty, safety and liquidity.

5. While the Initial Decision divided the representations made by respondent into three categories (growth representations, development representations, and investment representations), we have chosen to

representations were true. We find that respondent misrepresented the investment value of its properties, engaging in deceptive and unfair practices which violated Section. 5. Next, we discuss respondent's "high pressure" sales techniques and find that certain of these techniques constitute deceptive and unfair practices when, as here, they are used in the context of a sales scheme employing deceptive representations. We also address the finding in the Initial Decision that respondent's standard form sales contract was an "adhesion contract" and that four of its provisions were unfair and deceptive. While the Commission finds that respondent's contract has elements of an adhesion contract, it reverses Judge Teetor's finding of liability as to three of the provisions -- the interest charging clause, the integration clause and the alienability of land clause. The Commission sustains his finding of unfairness as to the forfeiture clause. We also consider respondent's substantive defenses and numerous allegations of procedural and evidentiary errors in the administrative proceeding. While the Commission finds for the respondent on some of these assignments of error, none of these ruling individually or collectively bar our finding of liability and entry of an order against respondent.

Finally, the Commission rejects complaint counsel's appeal seeking further order provisions because we find that the suggested provisions are unnecessary to stop present deception or to prevent future deception. We also revise the Judge's proposed order to reduce the compliance burden by making its provisions more consistent with the requirements of the Interstate Land Sales Full Disclosure Act and the implementing regulations of the

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analyze all of these types of representations together as investment representations. Because the majority of respondent's customers were purchasing their property for investment purposes (I.D. 183), respondent's representations as to growth potential and state of development of its subdivisions were made primarily to convince potential buyers that the lots it was selling would indeed make good investments, and not to convince buyers that its subdivisions would be a good place for them to live.

Department of Housing and Urban Development's Office of Interstate Land Sales.[6]

II. *Jurisdiction*

Respondent argues that, in enacting the Interstate Land Sales Full Disclosure Act ("ILSFDA"), Congress intended to bestow exclusive jurisdiction over land sales practices upon the Office of Interstate Land Sales Regulation ("OILSR"). Thus, respondent asserts, we are without jurisdiction to consider this matter. Respondent's arguments play several variations on this theme. First, respondent asserts that ILSFDA is a pervasive and comprehensive statute directed precisely at the type of practices at issue in this case, and that enactment of ILSFDA consequently "preempted" or "impliedly repealed" the more general provisions of the prior FTC Act.[7] (RAB at 26-27) Second, it argues that ILSFDA created an implied immunity from, or an implied repeal of, Section 5 with respect to land sales, since application of that Act would conflict with (or be repugnant to) the statutory scheme set out in ILSFDA. (RAB at 27-29)

The argument that Congress somehow intended to exempt land sales practices from FTC scrutiny in enacting ILSFDA was thoroughly explored -- and rejected -- in the Commission's recent opinion in *Horizon Corporation.*[8] After an extensive analysis of ILSFDA and its legislative history, including its amendments, as

6. 24 C.F.R. § 1700.1 *et. seq.* (1982)

7. While respondent raises its "preemption" argument as a separate and additional ground from its "implied repeal" argument, "preemption" (in the sense that respondent is using the term) is not really a distinct theory separate from implied repeal. While the term preemption is used in a number of decisions, the claimed overriding of one statute by later enactment *sub silentio* is a claim of repeal by implication. *Environmental Defense Fund* v. *EPA,* 598 F. 2d 62, 76 (D.C. Cir. 1978).

8. *Horizon Corporation,* 97 F.T.C. 464 (1981). While the Commission's opinion in *Horizon* was the product of the Commission's independent review of the record, the terms of the order largely reflected provisions which were agreed to by both complaint counsel and respondent. The Commission expressly noted that "since the remedial scheme was developed in the context of respondent's offer to withdraw its appeal if the Commission adopted complaint counsel's proposed modification of the ALJ's order, the Commission will not necessarily view this remedial

well as the implementing regulations adopted by OILSR, we concluded there that Congress did not intend ILSFDA to be a pervasive statute covering all activities relating to land sales. We also concluded that application of the FTC Act is not in conflict with, or repugnant to, ILSFDA. There, we stated:

> [R]egulation of fraudulent land sales practices under both ILSFDA and Section 5 is a complementary but not coterminous process. Review of land transactions is complementary because the ultimate regulatory goal -- protection of consumers from fraudulent business practices -- is the same under both statutues. Yet, the scope of each agency's review authority and its ability to rectify abusive practices are vastly different. *Horizon Corporation*, 97 F.T.C. 464, 864 (1981).

Therefore, since the repeal of Section 5 as to land sales practices is not necessary for ILSFDA to work as Congress intended, we reject the argument that ILSFDA "impliedly repealed" our jurisdiction or granted an implied immunity to land sellers from Section 5. *See Cantor* v. *Detroit Edison*, 428 U.S. 579, 597 (1976); *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 685 (1975); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

AMREP also claims that we are without jurisdiction under the doctrine of "primary jurisdiction." According to respondent's argument, the Commission must first defer to OILSR as the agency with primary jurisdiction in the land sales area. Since respondent has allegedly complied with all applicable OILSR regulations and requirements, it asserts that the Commission is without power to prosecute it under Section 5. (RAB at 30-32)

The doctrine of "primary jurisdiction," however, is a judicially-created doctrine developed to apply in those situations where both an agency and a court have jurisdiction to decide in

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scheme as a model for relief in future land sales cases." *Horizon, supra,* at 803.

the first instance and thus is not applicable here. *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *Sunflower Electric Co.* v. *Kansas Power & Light Co.*, 603 F. 2d 791 (10th Cir. 1979). *See also Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981). The purpose of the doctrine is to enable a court to postpone exercising its jurisdiction in order to obtain the benefits of agency expertise in the area being contested and to maintain uniformity. *Id.* at 64. That rationale does not apply where two agencies, each with expertise, share "complementary, but not coterminous" jurisdiction over the challenged practices.[9] In any event, the doctrine, even if applied here, would not (as respondent argues) pose a jurisdictional bar to our action, since the doctrine stands only for the proposition that a court (or, as respondent argues, one agency with limited expertise) should *postpone* exercising its jurisdiction until it obtains guidance from the agency with superior expertise. Given the Commission's significant involvement with the land sales industry and its expertise in defining unfair and deceptive trade practices with respect to land sales practices,[10] it is evident

9. Since the doctrine is primarily concerned with the proper relationship between a court of general jurisdiction and an agency with specific expertise, much like the "exhaustion of administrative remedies" doctrine, it is doubtful that the doctrine applies at all in the situation where only agencies are involved. The cases cited by respondent, *American Air Lines, Inc.* v. *Air Line Pilots Association*, 91 F. Supp. 629 (E.D.N.Y. 1950) and *Food Fair Stores, Inc.*, 54 F.T.C. 392 (1957), do not apply the doctrine of primary jurisdiction to a situation where two agencies are regulating the same subject matter. However, that doctrine was cited in *Brown-Forman Distillers Corp.* v. *Mathews*, 435 F. Supp. 5 (W.D. Ky. 1976), involving the Food and Drug Administration and the Bureau of Alcohol, Tobacco and Firearms. That Case is distinguishable, however, because the two agencies involved had entered into a Memo of Understanding which gave one agency the power to regulate.

10. *See, e.g., Bankers Life and Casualty Co., et al.*, 94 F.T.C. 363 (1979); *Cavanagh Communities Corp., et al.*, 93 F.T.C. 559 (1979); *Australian Land Title, Ltd., et al.*, 92 F.T.C. 362 (1978); *Flagg Industries, Inc.*, 90 F.T.C. 226 (1977); *Las Animas Ranch, Inc., et al.*, 89 F.T.C. 255 (1977); *International Telephone and Telegraph Corp.*, 88 F.T.C. 933 (1976); *Turkey Mountain Estates, Inc., et al.*, 84 F.T.C.

that the Commission need not first obtain the guidance of OILSR before resolving the issues in the instant case. Respondent's argument may also be understood to mean that, as a matter of policy rather than law, the Commission should defer to OILSR in this case. Since OILSR has not suspended respondent's registration, respondent urges that we should defer to OILSR's apparent judgment that respondent's practices are satisfactory. Aside from the observation that OILSR's failure to act does not necessarily mean that OILSR has found AMREP's disclosure statements to be satisfactory, assuming that respondent has complied with OILSR regulations simply does not afford respondent immunity from Section 5 scrutiny.[11] As we stated in *Horizon, supra,* at 863:

> Compliance with OILSR's requirements cannot be construed as immunizing a company's overall sales techniques from scrutiny under Section 5. The OILSR regulations are meant to be preventive safeguards against improper sales tactics. Situations will exist, as in the instant case, where the overall sales plan is such that consumer injury results despite technical compliance with requirements.

At the same time, respondent raises legitimate concerns about a number of provisions in the Judge's proposed order which conflict with OILSR requirements. Such concerns, however, go to the question of the appropriate remedy, and not to our power to act. As discussed in a later section of this decision, we have modified the proposed order in several respects to avoid possible conflicts.

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698 (1974); *GAC Corporation, et al.,* 84 F.T.C. 163 (1974); *Harney County Land Development Corp., et al.,* 71 F.T.C. 12 (1967).

11. *Cf. U.S.* v. *Pocono International Corp.,* 378 F. Supp. 1265, 1267 (S.D.N.Y. 1974) (compliance with ILSFDA is not a defense to a suit under the mail fraud statute for fraudulent interstate land sales executed through the mails). *See also Reilly* v. *Pinkus,* 338 U.S. 269, 277 (1949) (Post Office approval of challenged advertisements is no defense to a Section 5 proceeding); *U.S.* v. *RCA,* 358 U.S. 334, 342 (1959) (FCC approval of a change in radio station ownership is no defense to a Sherman Act violation).

Finally, respondent argues that it is immune from Commission prosecution under the state action immunity defense. *See e.g., California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum,* 445 U.S. 97 (1980); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 790-1 (1975); *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 360 (1977); and *Parker* v. *Brown,* 317 U.S. 341, 350 (1943). The Parker doctrine is inapplicable to the present case. That line of cases deals with an implied exemption from the federal antitrust laws where there is a conflict between the federal policy favoring competition and a state regulatory scheme which deliberately displaces competition. No question of conflict with federal antitrust laws is involved here. Nor do the broader principles of federal preemption and comity between the federal government and state governments which form the basis for the *Parker* doctrine apply here. The states, in enacting their own land sales disclosure and registration statutes, are not envincing an intent *contrary* to the intent of federal consumer protection laws; indeed, such regulations are complementary to federal consumer protection efforts. In the absence of any clear repugnancy between the state law and the federal law, the question of an implied exemption from federal law does not arise. *Cantor* v. *Detroit Edison,* 428 U.S. 579, 597 (1976). Federal law therefore applies, and compliance with state law is not a defense either to a federal prosecution, *Cantor, supra,* at 594, *United States* v. *Sylvanus,* 192 F.2d 96, 106 (7th Cir. 1951), or to a Section 5 proceeding. *Royal Oil Corp.* v. *FTC* 262 F.2d 741 (4th Cir. 1959), *Speigel, Inc.* v. *FTC,* 540 F.2d 287, 292 (7th Cir. 1976).

Respondent claims, however, that it was unable to prove its state action immunity defense because Judge Teetor improperly refused to permit numerous state regulators to testify or to admit into evidence documentary materials from state regulators. (RAB at 32) However, as discussed above, the *Parker* defense is inapplicable in this case. Thus, even assuming that respondent could have shown that there was active state regulation of land sales and that respondent complied with applicable state laws,

such a showing would have provided no defense to this action. Accordingly, we see no error in the Judge's refusal to admit the evidence for the purpose of demonstrating that the states actively regulated the land sales industry and that AMREP had complied with state laws or had received state approval for its activities.

For the above reasons, we reject respondent's contention that the Commission lacks jurisdiction of this case, and affirm the ALJ's findings on the issue of jurisdiction.

III. *Respondent's Investment Representations*

A. *AMREP's Marketing Strategy*

In 1961, respondent purchased a large 54,000 acre tract of land in Sandoval County, New Mexico, northwest of Albuquerque. After the tract was platted, respondent named it Rio Rancho Estates and began selling undeveloped lots to the public through the mail and direct selling to tourists. (I.D. 54) During the second half of the 1960s, however, respondent developed a new marketing plan for selling its undeveloped lots at Rio Rancho. With minor variations, the same marketing strategy and sales presentations were later used in respondent's other three subdivisions involved in this matter.

The heart of the marketing strategy involved inviting consumers who lived far from respondent's projects to a free dinner party, where a carefully staged sales presentation of films, slides, testimonials and enthusiastic speeches generated such excitement that many consumers would sign contracts to buy lots at respondent's subdivisions, sight unseen, before the night was over. To help counter any reluctance, respondent also offered a subsidized "vacation" tour of the subdivision and the right to cancel the purchase after seeing the purchased lot within six months (I.D. 54)

While most of the sales presentations were handled by small sales subsidiaries, the unified marketing plan -- what the ALJ

called "respondent's organized offense" (I.D. 63) -- was thoroughly crafted and controlled by respondent's headquarters in New York. Respondent's headquarters produced sales training materials, reviewed or prepared all advertisements, wrote standard dinner scripts, printed glossy brochures, supplied all forms and contracts, and produced the highly effective movies for each subdivision. (I.D. 3; I.D. 56-79) The respondent also set prices for the land to be sold through the sales subsidiaries. It also audited sales practices and dinner party presentations to ensure conformity with its marketing strategy. (I.D. 3)

The basic theme of respondent's standard sales presentation, used at all four of its subdivisions, was that the purchase of a lot at one of respondent's subdivisions was an excellent, low-risk investment. Promoting the lots as a present or future homesite, or as a vacation home, was subordinate to the main investment message. Throughout the 1960s, the investment theme was conspicuously trumpeted in respondent's Rio Rancho brochures (I.D. 190-192), national and regional advertisements (*see, e.g.*, CX 232), dinner presentations (I.D. 193), and training sessions for salesmen (I.D. 186). As one salesman put it quite plainly in a dinner presentation:

> It is not important that you live there [at Rio Rancho Estates] or that you retire there or even that you visit there. The only thing that's important is that you want to make money. (CX 110 D).

In 1972, respondent began to tone down the overt investment promises in prepared brochures and films. (I.D. 194-199) Instead of directly making claims about the handsome profits buyers could expect from future increases of land prices at respondent's subdivisions, respondent instead stressed examples of appreciation of land located in its subdivisons, in the same geographic area as its subdivisons, or in other areas of the country. (I.D. 178-179; 205; 196-199) At the same time, respondent increased the use of themes promoting its subdivisons as sites for relocation, vacation,

or retirement homes. While explicit investment claims in respondent's brochures and films were somewhat tamed (at least in comparison to the blatant investment promises of the 1960s), there was less change in the dinner speeches and sales presentations made orally at dinner parties during the 1970s. As Judge Teetor found, the sales representatives were adept at making explicit the theme that had now become more implicit in AMREP's prepared materials -- that respondent's land was an excellent, low-risk investment. (I.D. 200-209) The same investment pitch appeared in sales presentations for Silver Springs Shores (I.D. 205), Eldorado at Santa Fe (I.D. 206), and Oakmont Shores (I.D. 207) throughout the 1970's.

Despite the increased promotion of respondent's land as being suitable for homesites during the 1970's, the evidence strongly suggests that few buyers were in fact buying it for present or future homesite use. About eighty percent of buyers of Rio Rancho lots indicated at the time of sale that they were not buying the lots as homesites for their principal residence. (I.D. 24)[12] While that fact does not exclude the possibility that the lots were bought for future use (*i.e.*, as a vacation or retirement home), respondent's experience with Rio Rancho and other subdivisions, as well as its general knowledge about the land sales industry, gave it reason to know that few buyers would ever actually settle on the land they had bought. In respondent's first development, Rainbow Lakes in Florida, no more than seven percent of the buyers there had ever built on their lots, more than twenty years after all the lots had been sold. (I.D. 185) In Rio Rancho, after more than fourteen years of selling lots, only 2500 lots had been improved out of the more than 75,000 sold. (I.D. 17) Further, a consultant's report prepared for respondent in

12. This fact is hardly startling, considering (as discussed later) the fact that the vast majority of lots at Rio Rancho had no utilities, and that the cost for an individual to install utilities was prohibitive. Such lots would be suitable for homesites only when (and if) the pace of development justified extension of utilities to those lots.

1966 warned respondent not to expect more than about five percent of the buyers to actually settle in Rio Rancho. (CX 231, p. 34) The conclusion is evident that the great majority of buyers of respondent's land were indeed buying primarily for investment purposes.

B. *Investment Representations*

The heart of the Initial Decision is Judge Teetor's finding that respondent sold its land for investment purposes by making representations about the nature of investment in general and the particular attributes of the land it was marketing which were misleading and deceptive. (I.D. pp. 265-268) In the following sections, we first review the general investment representations made by respondent and then turn to the representations made about its properties which were designed to convince potential buyers that AMREP property was one of the best land investments available.

1. *General Representations about Land as an Investment*

Much of respondent's marketing scheme was designed to convince prospective buyers that, as a general proposition, buying land was an excellent investment. Quotes about that "inevitability" of profit in land investment and testimonials from famous financiers and public figures citing the superiority of land as an investment are liberally sprinkled throughout respondent's sales brochures and films. (*E.g.*, CX 61 L-M) Respondent's sales personnel and promotional literature represented that land values everywhere in the United States were constantly going up. (CX 110 J; CX 8; I.D. 284-286)

Respondent's sales presentations also painted a tantalizing picture of extraordinary profits realized in various land booms. (I.D. 287-289; for example, Staten Island property after the Verrazano-Narrows Bridge was completed between Brooklyn and Staten Island, CX 38 G-H and Cherry Hill, New Jersey across the Delaware River from Philadelphia, CX 111 D.)

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After convincing prospective buyers that land in general was a good investment, respondent's sales presentations went on to demonstrate that land was in fact an investment superior to any other available to the average investor. Dinner speakers compared an investment in real estate to investments in savings accounts, bonds, stocks, and insurance. (CX 37 F-H; CX 38 U-V; Salesman Wilson; Tr. 9662; I.D. 293-294) The presentations stressed the low rates of return on savings accounts and insurance and bonds, and the risks associated with stocks, contrasting them with the certain appreciation of land at rates of 10 to 30 percent. (Salesman Wilson, Tr. 9663). In addition, the sales presentations stressed the availability of "leverage" in real estate investment, by which a low down payment could "control" the full appreciation on the property. (I.D. 290-291) Using the principle of leverage, which was represented as being unique to land investment, potential buyers were told that their rate of return on their land investment could easily be 150 percent. (CX 112 J; CX 110 M; CX 37 F-H; consumer Bechoff, Tr. 4274, 4305). As an investment, land was touted as the best means of beating inflation, a theme hammered away at in films, dinner presentations, and brochures. (I.D. 299)

After persuading potential buyers on the superiority of land as an investment vehicle, respondent's sales presentations turned to demonstrating the advantages of its subdivisions as an excellent, risk-free investment. While the land sales generalities discussed above were used in connection with the sale of lots at all of respondent's subdivisions, respondents also made separate investment representations about each of the land projects, discussed below.

2. *Investment Representations about Rio Rancho Estates*

(a) *Representation about Investment Value*

Rio Rancho Estates consists of 91,000 acres of arid rangeland, located northwest of Albuquerque, New Mexico, in Sandoval

County.[13] Nearly 85,000 of those acres have been platted into 100,186 lots. As of 1976, respondent had sold 75,134 lots; only 1800 residential units were occupied by 1975. (I.D. 16-18) Beyond the small developed core, utilities were virtually unavailable. (I.D. 313-318)

Respondent's sales presentations for Rio Rancho, including films, brochures, and prepared scripts for dinner presentations, emphasized the theme that buyers were being given a last chance to invest at a low price before Rio Rancho was hit with a "land boom" which would cause a spectacular rise in land prices. Sales presentations compared Rio Rancho to land in other parts of the country which had experienced rapid appreciation due to speculation in a land sales boom. In referring to a number of bridges that had recently been constructed over the Rio Grande leading to Rio Rancho, for example, sales representatives pointed to the explosion in property values in areas such as Staten Island and Cherry Hill, New Jersey, after the opening of bridges to those areas had made them accessible for the first time to urban areas. (I.D. 287; CX 35 D; CX 38 G; CX 111 D, CX 169 G). As one sales representative noted after making the comparison:

> If tonight I told you nothing more about our program than the documented story of the bridges and what they can mean to land values in Albuquerque, just as the Verrazano Bridge has influenced land values in Staten Island, I think this in itself would be sufficient for everyone seated in this room to join our program. (CX 38 G)

Respondent's sales presentations also drew comparisons to examples of appreciation in the Albuquerque area, leading potential buyers to believe that they could expect similar appreciation at Rio Rancho. Specific examples were cited in respondent's standard brochure (CX 32 I) and sales scripts (CX 36 A-B) throughout 1973. One illustration noted a profit of $18,000 in a little

13. Albuquerque is located in Bernalillo County.

more than eight months, while another showed $2,000 for one year.[14] (CX 32 I)

Respondent's sales presentations also stressed that land at Rio Rancho *itself* had been rapidly increasing in market value. Respondent regularly announced price increases for unsold lots at Rio Rancho, usually annually and sometimes semi-annually, on the order of a 10 to 15 percent increase each year. (I.D. 27-28; CTX 34). The history of price increases was often communicated to prospective buyers (I.D. 302-303) and advance notice of future price increases was routinely communicated to existing lot owners. (I.D. 304, 309) Potential buyers clearly understood this history of price increases to mean that the *market value* of Rio Rancho land had increased, equating AMREP's selling price with market value,[15] and existing owners were led to believe that the value of their lots had increased. (I.D. 302-303) Such actions had the tendency or capacity to lead consumers to believe that lots at Rio Rancho were appreciating in market value at between 10 to 15 percent per year, and that such appreciation was likely to continue.

Respondent also promoted Rio Rancho as an investment by representing that the sales price for the lots was below fair market value, implying, in turn, that buyers would realize a profit immediately upon buying the land. (I.D. 188) Early versions of Rio Rancho promotional materials flatly asserted that the offering

14. The examples in the brochure were accompanied by a disclaimer which stated that the examples "do not, in any way, represent or imply a promise or prediction of future land values or prices which, of course, depend on location, rate of development, marketability, population growth, plus other factors." In the context of respondent's total presentation, we find that this disclaimer was ineffective in dispelling the only relevant message such case histories were plainly intended to convey: that respondent's land possessed the same tantalizing potential for quick profits.

15. Indeed, respondent apparently does not dispute that consumers could reasonably have understood the selling price to be about equal to the fair market value, since it contends that the selling price in fact, represented fair market value. (RAB 55-56; Respondent's Answer to Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, and Order 104-112)

price was below market value. (CX 237 B, CX 393 E) Later versions, used after 1972, made the same representation, albeit in a more guarded way. (CX 30 M, W) The same point is made in brochures, films, and dinner scripts, which compare the selling price of a lot at Rio Rancho with the higher market value of land located near Rio Rancho. (CX 36 L; $12,000 per acre for community "just across a 50-foot road from Rio Rancho"; CX 30 G; CX 24 I; improved land "1/4 mile from our doors" is $6,000 per acre.) Such comparisons had the tendency or capacity to lead potential buyers to believe that the sales price of Rio Rancho land was below the fair market value of the land.

Respondent also represented that a land investment in Rio Rancho involved little or no risk. (I.D. 211; "as guaranteed and protected a program as you will find anywhere", CX 37N; a "safe, sound, sensible, prudent real estate investment", CX 456 H.) Such claims had the tendency or capacity to lead potential buyers to expect, not only that they would not lose their capital invested, but also that there were no significant risks, such as illiquidity, which would prevent them from selling and taking a profit at any time. This impression was significantly heightened by representations made by respondent's sales representatives that a lot at Rio Rancho would not be difficult to resell. (I.D. 212, 213) Respondent did not, however, represent that it would assist buyers in resale or guarantee resale. (I.D. 214)

It is also clear that respondent failed to disclose that land at Rio Rancho might be illiquid or difficult to resell. The company's former president admitted that "company policy was not to discuss resale." (Friedman, Tr. 24208) If potential buyers asked, Friedman testified that the policy was to tell them not to expect a resale market until after the company had substantially stopped selling the land. (Friedman, Tr. 24208) However, in many cases, respondent's salesmen indicated that, considering the rapid rate of sales, respondent would soon be out of available land. (CPF 104)

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As discussed in detail below, the main theme used to convince prospective buyers that buying land at Rio Rancho would be a profitable investment was that Rio Rancho was destined to become a thriving suburb of Albuquerque in the near future. Respondent pictured Albuquerque as a city "bursting at the seams," with only one direction in which residential growth could go: toward Rio Rancho. With insatiable demand and limited supply, the price of Rio Rancho lots could only go rapidly up.

Respondent represented Albuquerque as an area of explosive growth.[16] In addition to subjective descriptions of the growth (*e.g.*, "bursting at the seams" CX 35 C-D, "growing at an unprecedented pace" CX 81, CX 203; I.D. 98), respondent made specific predictions about Albuquerque's population in the ten to twenty year time frame. During the 1960's, respondent predicted that Albuquerque's population would double in the next ten years, which would result in an increase of about 275,000 people in that time. (I.D. 101, 102, 105)[17] After the 1970 census figures became available, when it became clear that such projections were too optimistic, AMREP revised its predictions for the next 10 year period, projecting various population figures for 1980 which would have resulted in population increases of 70,000, 170,000 and 270,000.[18] (I.D. 110-111)

16. Judge Teetor treated growth and development representations apart from investment representations. (I.D. 97-158) Here, we treat them together as they were part of the investment equation and part of the overall investment claim. Respondent's growth projections were predictions about the demand for residential land in the Albuquerque region. Combined with the representation that there was only a limited supply of residential land, the growth claims led consumers to believe that residential development around Albuquerque would quickly move towards (and through) Rio Rancho. The development representations further enhanced the implication that Rio Rancho would be a thriving, residential suburb of Albuquerque in the near future. As other available land was rapidly put into residential use, demand for land at Rio Rancho would soar, taking property values with it.

17. In 1961, respondent predicted that Albuquerque's 1970 population would be 550,000. (CX 393 B) In 1968, it projected the 1975 population as 600,000. (CX 38 O)

18. These inconsistent projections were all made at the same time. In the 1972 revision of its Rio Rancho brochure, "This is My Land",

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In conjunction with the representation that there would be very strong demand for residential space to accommodate this anticipated population boom, respondent also represented that, because of constraints to development on three sides of Albuquerque, the great majority of the residential growth would be in the direction of Rio Rancho, and that Rio Rancho was directly in the path of Albuquerque's suburban development. (CX 30D) The so-called "frame theory," present from respondent's earliest brochures, portrayed the geographical and legal constraints on three sides of Albuquerque which respondent said would block development. (I.D. 117-123) As succinctly stated in a 1972 Rio Rancho brochure:

> Mountains to the East, and federal, state and reserved lands along the northern, southern and part of her western borders are now virtually "containing" Albuquerque's future growth. According to experts, *Albuquerque's future growth pattern is largely determined.* Expansion is destined to take place in the general direction of Rio Rancho Estates. (CX 32 H) (Emphasis in original)

Some of respondent's earlier representations were stronger, stating that the Northwest was the *only* direction in which development would go. *See, e.g.*, I.D. 123.

With strong demand and limited supply, respondent predicted that the pressures of suburban development would engulf Rio Rancho in under ten years. While respondent's prepared brochures and prepared sales materials made no predictions as to the timing of development, numerous sales representatives told potential buyers that, because of the expected brisk pace of development, utilities could be expected to reach their lots within three

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1980 populations of over 600,000 and over 500,000 were variously mentioned. (CX 32 G; CX 32 M) The contemporaneous revision of AMREP's other Rio Rancho brochure, however, predicted a 32% increase over Albuquerque's 1970 population, which yields a population projection of 400,000 for 1980. (I.D. 111) Subtracting the actual 1970 population of 330,000 gives the figures cited in the text. (I.D. 99)

to five years. (Other estimates ranged from a low of two years to a high of eight years.) (I.D. 327-328)[19] While respondent generally did not misrepresent its contractual obligations to develop Rio Rancho,[20] and did not mislead buyers as to Rio Rancho's present state of development or as to the present availability of utilities on their lots,[21] Judge Teetor found, and we affirm, that consumers were misled as to the pace of residential development and how

19. Respondent's attempt to rebut this testimony was unsuccessful. (I.D. 331) Respondent does not defend such statements as being accurate, but rather argues (1) that other sales representatives did not make such predictions and (2) that it instructed sales representatives not to make such promises or predictions. (RPF 134-136; I.D. 326) While some sales personnel may not have made such claims, the record shows that despite the purported company policy, a substantial number of its sales personnel nevertheless made specific time predictions for the arrival of utilities. As we noted in Horizon, supra, at 815:

> [E]ven if [respondent's] management chose to remain ignorant of the time frame representations made by its sales force, its ignorance constitutes a failure to exercise reasonable diligence in controlling sales practices in the field, and does not serve as a defense to Section 5 liability.

Respondent raised this issue in its proposed findings of fact, but does not appear to press it in its appeal brief.

20. AMREP was not obligated under the contract to install any utilities. (CX 155) It was contractually bound to pay for the building of roads to Sandoval County specifications, and to give a buyer a lot of "comparable value" in the building area in exchange for the buyer's lot if, when the buyer was ready to build, utilities had not yet reached the buyer's lot. (CX 155 B) (This "exchange privilege" is discussed in more detail later in the opinion.)

Complaint paragraphs 34 and 35 charged, however, that respondent represented that it would build certain facilities in the near future in Rio Rancho. Complaint counsel produced evidence that some consumers were told that there would be a lake and golf course at Rio Rancho. (CPF 188-189) The ALJ, however, did not discuss this evidence and made no findings on this complaint allegation. We decline to find on the basis of the record before us that respondent represented that it would build any facilities at Rio Rancho.

21. There is no dispute that utilities (water, sewer, telephone, and electricity) were all available only in the building areas and in some of the adjoining units (specifically, units 11, 16, 17 and 7, which the ALJ refers to as the "Unit 16 complex"). (I.D. 313) Beyond this small fraction of Rio Rancho lots, utilities were virtually unavailable. (I.D. 318) The cost of having utilities installed was prohibitive for any individual owner to undertake. (I.D. 314-318)

fast utilities could be expected to reach their lots. By further referring to lots as "homesites", respondent enhanced the image of a subdivision ready to meet the expected influx of population[22] over the next several years.

Putting all of these claims together, respondent portrayed Rio Rancho as an excellent short-term[23] investment opportunity. Express comparisons to profits realized annually or in only a few years on other real estate investments, in Albuquerque and in

22. Judge Teetor found that respondent's references to vacant lots in the non-building areas as "homesites" had the capacity to mislead buyers into believing that their lots already had utilities installed or that utilities could be installed at a reasonable price. (I.D. 319-324) Had AMREP used the term standing alone, we would have agreed that the use of the term was deceptive. That conclusion is fortified by the fact that AMREP's use of the term violates OILSR regulations restricting the use of the term. OILSR's present definition (24 CFR 1715.20), promulgated in 1980, is more generous than the definition in force during the mid-1970's (see I.D. 319, note **), but would still preclude the use of the term "homesite" in describing Rio Rancho lots because potable water is not available at a reasonable cost at most Rio Rancho lots. According to respondent, the cost of drilling a well and installing a pump made individual wells "impractical." (RX 160 J)

However, AMREP's brochures and property reports made it fairly clear that utilities were not available outside of the building area. (I.D. 323-324; 314-317). Further, no consumers testified that they were misled as to the availability of utilities on their property. While respondent's use of the term was undeniably "loose" (in Judge Teetor's words), we find that the use of the term "homesite" did not mislead consumers as to the present availability of utilities, in light of the additional disclosures made in the brochures and property reports.

23. As the Commission noted in *Horizon*, we do not intend to rigidly define "short-term" or "long-term" investments. *Horizon, supra*, at 804, n.4. There, we accepted for the purposes of the opinion respondent's definition of a "long-term" investment as one that is greater than twenty years. In the present case, neither side produced much evidence as to the period of time that would be appropriately characterized as "short-term" or "long-term."

As discussed in the opinion, however, it is clear that respondent, through a variety of representations, led consumers to expect that they would realize substantial appreciation in a period of ten years or less. Giving the respondents the benefit of the doubt, and for the purposes of ensuring consistency with our opinion in *Horizon*, for the purposes of this opinion we will consider a "short-term" investment as one which would mature in twenty years or less.

other areas of the country, implied that Rio Rancho had similar potential for rapid development and appreciation. By raising its sales price for Rio Rancho lots frequently, respondent could point to a sustained history of successive price increases on the magnitude of ten to fifteen percent a year, leading potential buyers to believe that the market value of Rio Rancho lots had been rising and would continue to rise substantially every year. (I.D. 200-204) Respondent also represented that its sales price was below fair market value, virtually guaranteeing an immediate return of investment, and further emphasized that the investment involved little or no risk. Most of all, respondent represented that the heavy demand for, and limited supply of, residential land around Albuquerque would inevitably force development towards Rio Rancho, pushing up the market value of Rio Rancho land. Sales representatives assured numerous consumers that the pace of development would bring utilities to their lots within three to five years.

We conclude on the basis of the record that the respondent represented the purchase of vacant land at Rio Rancho as a short-term investment with the characteristics of high yield, certainty, and little or no risk.

(b) *The Investment Value of Rio Rancho*

Judge Teetor concluded, after a thorough review of the evidence, that there was sufficient land immediately available for residential development in and around Albuquerque to accommodate expected population growth for the remainder of the century, and that there would be no local demand for Rio Rancho land until well into the next century, if ever. (I.D. 103, 105, 155-56) He also found that, contrary to respondent's representations, the market value of land at Rio Rancho had not been and was not increasing, and that the price set by respondent for Rio Rancho lots was in fact up to five times higher than the fair market value of the property. (I.D. 226-229) He also found respondent's use of

comparisons between Rio Rancho land and profitable investments in land located in or near Albuquerque or in other "boom" areas to be deceptive. (I.D. 197-199, 287-289) He also found that, contrary to respondent's representations, there was no resale market for Rio Rancho lots, and as a consequence, that the purchase of Rio Rancho lots involved substantial investment risk. (I.D. 240-265) Judge Teetor concluded that the purchase of Rio Rancho land was, in fact, a poor investment involving significant risk.

On appeal, respondent disputes the ALJ's findings, and contends that the purchase of lots at Rio Rancho was and is a good investment, and that the various claims made by respondents were reasonable in light of what respondents knew at the time the claims were made. (RAB 35, 43)

We affirm the ALJ's findings, although our own analysis differs to some extent from his. For the reasons discussed below, however, we affirm his basic finding that the purchase of Rio Rancho lots is not, as represented, an excellent, low-risk investment, in light of the substantial likelihood that there will be no local demand for Rio Rancho land, and consequently a very limited resale market, until the turn of the century, if ever.

(i) *Rate at Which Available Land Will Be Developed and Growth Directed Towards Rio Rancho*

As we have seen, the central argument in respondent's investment value theme is that Rio Rancho would rapidly become developed because of the heavy demand for, and limited supply of, residential land near Albuquerque. The critical question -- how fast such development will occur, if ever -- depends on the interplay of a number of factors, including: (1) the rate of population growth; (2) the amount of residential land which is available for development in areas which are likely to be developed before Rio Rancho; and (3) the density at which the land will be settled.[24]

24. This type of analysis is called an absorption study. (Lusteck, Tr. 2630) See *Horizon, supra,* at 816, where we used a similar analysis.

Appendix "B"

(a) *The Basis for Development and Growth Claims in the 1960's*

Respondent asserts that, based on assumptions that were reasonable to make during the 1960's, it was justified in representing that there would be substantial residential development in Rio Rancho. Respondent's main expert witness in this segment of the case, Mr. Arthur Fawcett, testified that during the 1960's respondent would have been reasonable in projecting the population of Rio Rancho to be 170,000 by the year 2000.[25] (Tr. 12283; 12287)

The evidence persuades us to disagree. Throughout the 1960's, respondent was making population projection claims which were unreasonably high in light of the projections being made during the same period by the official city agency responsible for planning for expected growth, the Albuquerque City Planning Department, which was the only source of population projections for the Albuquerque area during the 1960's. At the same time that respondent was representing that Albuquerque's population would double between 1960 and 1970 a projected increase of

25. Since the complaint in this case did not allege that respondent violated Section 5 by failing to have substantiation demonstrating a reasonable basis at the time the claims were made, neither side produced much evidence concerning what respondent *actually* relied upon (if anything) in making its growth, development and investment claims. Instead, respondent offered the testimony of Mr. Fawcett, which purported to demonstrate that, based on data that would have been available and assumptions that would have been reasonable to make during the 1960's, respondent's claims were reasonable. Both sides and the ALJ apparently agreed that this "reasonableness" standard was the appropriate standard to use in this case. (*See, e.g.,* I.D. 101) Generally, of course, the intent or good faith of a seller is not a defense to a Section 5 cease and desist proceeding. *Chrysler Corp.* v. *FTC,* 561 F.2d 357 (D.C. Cir. 1977). The Commission has the authority under Section 5 to stop false claims even if the claimant is acting "reasonably" in making the claim. The good faith of the claimant, however, may be relevant to the scope and terms of a cease and desist order.

In any event, as discussed in the opinion, it is evident that respondent did not act reasonably in making the challenged investment claims, and under any standard, violated Section5. See discussion under Part III.D.4, regarding respondent's "opinion" defense.

about 275,000 persons, the City Planning Department in 1962 was predicting the most likely increase to be about 100,000.[26]

Respondent's claim that much of the expected growth between 1960 and 1970 would go toward Rio Rancho was plainly unreasonable in light of the amount of land more suitable for residential development in areas closer to Albuquerque. Respondent's expert witness, Fawcett, testified that despite constraints on the development of land around Albuquerque,[27] there was enough

26. The 1962 "AMA X-Ray Report" (CX 251) used population projections prepared for the Albuquerque City Planning Department by Stanley Brasher, an economics and planning consultant. He projected a range of population figures, depending on certain assumptions. For 1970, Brasher projected a "low" figure of 322,944, a "middle" figure at 372,576, and a "high" figure of 420,096 -- increases of about 47,000, 96,500, and 144,000, respectively, over the city's 1960 population of 276,000. (I.D. 99; CX 251 z 89)

In 1964, the City Planning Department, together with the Albuquerque Transportation Study, released the "1985 Land Use Plan" which contained population projections developed for transportation planning purposes. (CS 546) The 1985 Land Use Plan projected Albuquerque's 1970 population to range from a low of 336,400 to a high of 418,000 -- the latter figure based on "a more liberal, but not unreasonable, estimate of future immigration." (CX 546 O)

The ALJ found respondent's "puerile theory" that population would simply continue to double to be unreasonable. (I.D.103-105)

27. The evidence shows that during the 1960's and 1970's, there were, in fact, geographical and legal constraints on the future expansion of Albuquerque. To the north of the city lies the 23,000 acre Sandia Indian Reservation. To the east lie the Sandia Mountains. To the south lie the city airport and the Kirkland Air Force Base, while further south lies the 211,000 acre Isleta Indian Reservation. To the west, south of Rio Rancho Estates, lie the 91,000 acre Pajarito and Atrisco land grants which are not currently developable because of title problems stemming from the original Spanish land grants. (I.D. 127-150)

Nevertheless, it is evident that there was a substantial amount of available land *within* that "frame." The ALJ, after a careful review of the record, estimated conservatively that 45,600 acres were immediately available for residential development in and around Albuquerque. (I.D. 155, figure 11)

We adopt those findings with one exception: the ALJ should not have included the 15,000 acres of vacant land in the city. (I.D. 152) The preponderance of the evidence shows that the vacant land in the city was not immediately available for development. (Carruthers, Tr. 11131-39) In addition, by using the city's vacant land in his absorption calculation,

land "reasonably available for development" in and around Albuquerque to accommodate a population of 650,000, and that there would be no need for growth to go out of Bernalillo County and toward Sandoval County and Rio Rancho until that population point was reached. (Tr. 12286) During the 1960's, the City Planning Department did not expect Albuquerque's population to reach 650,000 until at least the mid-1980's, even using the highest reasonable population projections.[28] Further, the City Planning Department believed that future development would occur at slightly higher densities that in the past.[29] Consequently, both the

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the ALJ inadvertently changed one of his assumptions, namely, that gross density remained the same.

The remaining 30,000 acres is a highly conservative estimate, a fact apparently conceded by respondent's expert witness, Fawcett, who estimated that a total of 125,000 acres (including the present developed area;) in Bernalillo county could readily accommodate population growth. (Fawcett, Tr.12823)

It is important to note Judge Teetor's conclusion, with which we concur, that some of the constraints may not, in fact, be constraints by the time development reaches the edge of the "frame." (I.D. 158) He notes, for example, that the Sandia and Isleta Indians have already prepared a master plan to develop part of their land, and further notes that with approval from the Interior Department, Indian land can be leased on a long-term basis, or, with approval of Congress, can be conveyed. (I.D. 134-136) Additionally, the ALJ notes that the current title problems currently hindering development of the 91,000 acre Pajarito and Atrisco land grants to the west of Albuquerque can, with time, be cleared. (I.D. 147-149).

28. The 1962 "AMA X-Ray Report" contained a "high" projection of 631,000 in 1980 (CX 251 z 93), and the 1985 Land Use Study contained a high population estimate of 830,000 by 1985 (CX 546 z 14) -- the highest projection made by any official study.

29. City Planner Carruthers, complaint counsel's main witness on this segment of the case, testified that density in the Albuquerque area would increase as development "filled in" vacant areas before going further from the city. He also testified that it was the policy of the City Planning Department to encourage such filling in.

Respondent's expert Fawcett, on the other hand, believed that the very low density of the Albuquerque region was likely to remain unchanged.

We find it unnecessary to resolve this dispute, since even using Mr. Fawcett's assumption about density, it is apparent that there would be no growth toward Rio Rancho during the 1960's and most of the 1970's,

1962 and the 1964 City Planning Department studies saw *no* growth into Sandoval County, in the direction of Rio Rancho, by the turn of the *century*, even using the highest reasonable population projections. The 1985 Land Use Study concluded that "[e]ven the most optimistic growth projections would not utilize this land within the current century." (CX 546 z 14) Indeed, the report noted that "[t]here is sufficient developable vacant land within the study area to accommodate a population of more than two million." (CX 546 z 6)

In addition, it is clear that the very nature of the land at Rio Rancho made it highly unlikely that Rio Rancho would be developed before other available land located close to Albuquerque. Unlike portions of the fertile Rio Grande Valley and the valleys of the Sandia mountains, the land at Rio Rancho was flat, arid rangeland. (I.D. 14; I.D. 233) In addition, Sandoval county was a rural area, poorer that Bernalillo County, making it a less socially desirable area for middle class development. (CX 231 R-S) Finally, the sheer vastness of Rio Rancho precluded individuals from developing their own parcels, since the cost of installing utilities was prohibitive. According to respondent, the cost of installing utilities at Rio Rancho's most remote lot was $315,000. (CX 162 K) Consequently, it was unreasonable to believe that there would be any demand for Rio Rancho until the land that was more attractive, less costly to develop, and closer to Albuquerque, was fully developed.

Significantly, respondent had actual notice that there would be no local market for Rio Rancho land until at least the mid 1980's, and that there would be no growth toward Rio Rancho during the 1960's and 1970's. A report prepared by an independent planning firm for respondent in May, 1966[30] warned that the population projections in the 1985 Land Use Plan were "too optimistic" for Rio Rancho planning purposes. The report reviewed in detail land

based on the highest population projections being made during the 1960's.

30. A preliminary summary report, containing substantially similar findings, was given to respondent in November, 1965. (CX 454)

availability and desirability in the Albuquerque area, noting that the Northeast area of the city was the area of most growth and the most desirable residential areas. (CX 231, R-S) Because Sandoval County and the western areas were relatively rural, poorer areas, the report noted that there had been only "limited success" in attracting new housing, occurring only "in peak building times when home demand was greater than supply." (CX 231 S) The report concluded:

> Despite the expected doubling of Albuquerque's population over the next twenty years to over 600,000 residents, ample undeveloped suburban land exists more proximate to the City and its desirable parts that Rio Rancho's land, such that only small and selective market penetration by Rio Rancho is likely over the 20 year period from 1966 to 1985.

(CX 251 VV).

It is evident that, even assuming heavy population increases and continuing patterns of extremely low gross density, the data available during the 1960's showed that there would be no growth toward Rio Rancho until the mid-1980's, after other available land had been developed. Even then, Rio Rancho was so large that there would have been no local demand for the great majority of the lots until the turn of the century. Assuming that all of Rio Rancho was developed at the same gross density as Albuquerque, Rio Rancho could have accommodated 220,000 people -- a population nearly as large as that of Albuquerque itself in 1960.[31]

31. Rio Rancho consisted of 54,000 acres until 1971. Applying the figure of about 5 persons per acre gross density, which represented the gross density within the Albuquerque city limits (Fawcett, Tr. 12286), Rio Rancho as constituted during the 1960's could have accommodated about 220,000 people. An alternative analysis provides an even higher figure. In 1971, our additional purchase expanded Rio Rancho to 91,000 acres, creating the potential for 114,760 dwelling units. (Fawcett, Tr. 12635) Using the average actual household size of Albuquerque in 1960 of 3.64 persons (Fawcett, Tr. 12630), Rio Rancho could have housed 417,726 persons.

Appendix "B"

By the year 2000, however, it is altogether possible that the present day legal restrictions hindering development of large parcels of vacant land around Albuquerque may well be removed, freeing up thousands of acres of land for development. (I.D.134-136; 147-149) If that occurs, the demand for much of Rio Rancho, particularly for the lots located further away from Albuquerque, is likely to evaporate altogether. While one cannot say for certain whether this will in fact happen, it plainly constitutes a substantial assumption in respondent's representation that such restrictions will operate to drive development toward Rio Rancho.

Consequently, the data available during the 1960's showed that it was highly unlikely that there would be a local market for Rio Rancho land for at least twenty years, and longer -- indeed, if at all -- for many of the Rio Rancho lots located farther from the city. Even assuming that respondent had some arguable basis for rejecting the official projections made by the City Planning Department -- which the record shows it did not -- the report by respondent's consultant clearly notified respondent that its claim that Rio Rancho would be substantially developed in the short term (i.e., less than twenty years) was unreasonable. While respondent was not reasonable in making such a claim prior to that report, continuing the use of such claims after the receipt of that report constituted a knowing deception.

(b) *The Basis for Development and Growth Claims in the 1970's*

In June, 1970, the preliminary 1970 census findings showed that the expectations of strong growth which everyone shared in the 1960's were wrong. Due to an unexpected sharp decline in in-migration and the birth rate, even the *lowest* City Planning Department's population projections made during 1960's turned out to be too optimistic: the 1970 population was 333,000, a ten-year increase of only about 57,000 persons. Rather than growing at the 100% rate represented by respondent, growth from 1960 to 1970 occurred at about a 20% rate. (I.D. 99) Despite the fact

that the changes in migration and birth rates meant that Albuquerque would not achieve a population of 600,000 until near the turn of the century -- the point at which respondent's expert Fawcett said development of Rio Rancho would only *begin* -- respondent purchased another 37,000 acres to be added to Rio Rancho in 1971.

Nevertheless, respondent asserts that it was justified in selling Rio Rancho as an investment during the 1970's and that it was reasonable to believe that Rio Rancho would be "substantially developed" by the year 2000, with a population of between 78,000 and 96,000 people. (Fawcett, Tr. 12272-12275)

All of the official population studies and projections done during the 1970's, however, project insignificant growth in Sandoval County through the rest of this century. The highest population projection made for all of Sandoval County in the year 2000 estimated the population at 40,000 -- an increase of only 22,500 from 1970. (Fawcett, Tr. 12606, 616-17) Even if Rio Rancho were to capture *all* of this growth -- an unlikely assumption -- it would mean the improvement of only 9000 lots from 1975 to 2000, leaving the other 90% of Rio Rancho unimproved.[32]

Further, the most recent projection of population for the Albuquerque SMSA referred to in the record puts that figure at a range of 609,000 to about 707,000 in the year 2000. (Fawcett, Tr.12616) Under Fawcett's own admissions, pressures to develop in the direction of Rio Rancho would thus not even start until the turn of the century, when the present legal restrictions on the development of other more accessible land may well be gone.

Fawcett's stoic projection of a thriving community at Rio Rancho by the year 200 in the face of those facts is simply

32. Fawcett testified that it would be appropriate to use the figure of 2.5 persons per household as an average Rio Rancho household size in the year 2000. (Tr. 12628) On the basis of that figure, about 22,500 persons could accommodated in 9,000 dwelling units, using Fawcett's average household size of 2.5 persons per household. Fawcett also testified that, based on the lots actually platted, Rio Rancho could contain 114,760 dwelling units. (Tr. 12635) Using Fawcett's assumptions, Rio Rancho has the potential to house 275,425 people.

explained: he believes that the population projections ignore the "non-local demand" for Rio Rancho. Fawcett admits that there will be a local market for only about 11,000 units through the year 2000, a figure which is reconcilable with official population studies.[33] He asserts, however, that an additional 18,000 units will be built by out-of-state purchasers who have retired or moved to Rio Rancho. This assertion assumes that a full 28 percent of Rio Rancho buyers will actually eventually settle there.[34]

Fawcett's prediction that over 28% of all Rio Rancho lot buyers will eventually settle there is unsupported by any factual basis. Respondent's own independent planning consultant warned respondent as early as 1966 that no more than 5% of buyers ever move to developments sold by land-sales developers. (CX 231, p.34, 454) AMREP's own experience with Rainbow Lakes, an earlier Florida project which had sold out in the 1960's with only 7% of the buyers ever moving there, and indeed with Rio Rancho (only 2500 lots settled after 14 years of selling), confirmed that expectation. (I.D. 273) Fawcett was unable to supply any basis for his assumption. When asked why the Bureau of Business and Economic Research of the University of New Mexico, the official agency responsible for predicting Albuquerque's population growth, apparently failed to give any weight to the argument that

33. Fawcett agreed that his projections were consistent with the projections of University of New Mexico's Bureau of Business and Economic Research (BBER) that there would be 40,000 people or less in Sandoval County in 2000 if the non-local demand were subtracted. (Tr. 13202-203) Since the 1970 population of Sandoval County was 17,492, the BBER projection predicted an increase of about 22,500 people from 1970 to 2000. Fawcett's projection of 11,000 local units assumes that *all* of the expected increase in growth in Sandoval County would go to Rio Rancho alone.

34. He testified that between 1975 and 2000, an additional 28,584 units would be built, 11,000 of which represented local demand. (Tr. 13202-203) Consequently, about 18,000 units would represent out of state demand. (Tr. 13,202-203) Assuming that most of the 2500 present units are "non-local," there would be a total of about 20,250 non-local units by the year 2000 under Fawcett's assumptions. Fawcett also testified that 71,620 lots had been sold at Rio Rancho. (Tr.12623) Using those figures, 28.3% of the total lots sold would be "non-local."

Rio Rancho would attract a substantial population from its non-local buyers, all that Fawcett could say was "in my opinion, they don't take into consideration the drawing power and the growth power of Rio Rancho. I simply disagree with them." (Fawcett, Tr. 12826)

Putting the "non-local" demand aside, it is further evident that Fawcett's testimony constitutes a significant admission that there will be *no* local market for the vast majority of Rio Rancho lots even by the turn of the century. Even if it is assumed that there is a local demand for about 11,000 dwelling units at Rio Rancho (which itself assumes that Rio Rancho will capture all of the growth going to Sandoval County by the year 2000), that assumption would result in a total of 13,000 dwelling units by the year 2000, excluding Fawcett's projected "non-local" demand and including present developed lots. (Tr. 13202-203) Yet Fawcett also testified that Rio Rancho had a total capacity of 114,760 dwelling units. (Tr. 12635) Fawcett's projection of 13,000 local dwelling units thus represents a little more than 11% of the total number 5 of dwelling units planned for Rio Rancho. At Fawcett's projection of 2.5 persons per dwelling unit, this would mean that Rio Rancho would attract only 26,720 persons from the expected population increase of 385,000 between 1975 and 2000, or about seven percent of the population increase. (Fawcett, Tr. 12678) A full 93 percent of the population increase, even under Fawcett's assumptions, would live someplace other than Rio Rancho.

(ii) *Market Value of Rio Rancho Land*

An important part of respondent's argument that Rio Rancho was a good investment hinged on whether its market value had increased and whether respondent's selling price was equal (or even below) fair market value. The evidence on the record of the present market value of Rio Rancho land was provided primarily by two expert appraisers, Jack Mann for complaint counsel and Richard Godfrey for respondent. Both experts were eminently

qualified to give appraisals. (I.D. 216) However, Judge Teetor found Mann's testimony to be highly credible, but found much of Godfrey's testimony to be of limited value. (I.D. 217-237)[35]

Based on a comparison with the Rio Rancho properties sold through the multiple listing service from 1970 to 1976, and sales of Rio Rancho lots at auctions in 1975 and 1976, Mr. Mann determined that the eight typical Rio Rancho lots he analyzed had an average fair market value in 1976 of $1200 per acre. (I.D. 225-227) At the same time, AMREP was selling its Rio Rancho lots for an average price of $6300 per acre.[36] (I.D. 228) We adopt

35. Godfrey based his opinion on 32 sales of "comparable" land. Originally, Godfrey wanted to testify to 800 "comparables", but Judge Teetor ordered that Godfrey limit his testimony to his "best" 25 (later extended to 32) "comparables." (I.D.231) Out of these 32, only 9 were vacant, unimproved lots located in Rio Rancho which had been resold. (The ALJ rejected 14 of the other 23 "comparables" as being not comparable to the lots at issue. Those lots were either improved or located in parts of Albuquerque very different from Rio Rancho. The ALJ rejected 8 other proffered "comparables" because respondent failed to provide independent evidence of the prices of the sale. (I.D. 232-236)) The ALJ calculated that the "pro forma" per acre resale price for those 9 comparables ranged from $3200 to $7332, with a mean price of $4514. (I.D. 235) However, the ALJ went on to reject Godfrey's ultimate opinion that the least value one-acre lot at Rio Rancho was worth $5,000, finding that "the structure of [Godfrey's] opinion is so deficient in probative value that we accord it no weight." (I.D. 237)

Respondent argues that the Judge erred in restricting Godfrey's testimony to his 32 "best" comparables. (RAB10-11) We see no prejudice to respondent and no error on the part of the Judge. Respondent was offered a fair opportunity to pick the "best" evidence; cumulative evidence would not have been helpful, and the ALJ was correct in limiting the testimony to advance the trial. Considering the ALJ's full reasons for rejecting Godfrey's opinion, respondent's inability to present other comparables was not prejudicial.

36. In determining fair market value, the experts apparently did not contend that AMREP's selling price represented the best evidence of the market value, but instead attempted to derive the fair market value from individual resales and from "open market" sales of comparable property. This approach to valuation is undoubtably correct in this case. As we noted in *Horizon, supra,* at 817, the fair market value of land is arrived at through arm's length bargaining, where both parties are knowledgeable, acting in their self-interest, with a reasonable time to complete the purchase, and the transaction is free from any undue stimulus. As in *Horizon,* our conclusion herein that respondent used

the ALJ's analysis of the record evidence with respect to the fair market value of Rio Rancho lots outside of the small developed core area. Indeed, even the testimony of respondent's own witness, Godfrey, established that respondent's sale price for Rio Rancho was higher than the fair market value that he had established.[37]

Perhaps even more importantly, the record shows that there simply is no local resale market for Rio Rancho land outside of the established core area. From the period of 1969 to 1975, out of a total of 878 Rio Rancho lot listings filed with the Albuquerque multiple listing service, only 16 were sold. (I.D. 220) The Albuquerque Multiple Listing Service even prepared a form letter to send out to inquirers which warned, "For your information, our records reflect that there is little, if any, local market for resale of tracts in this particular subdivision." (Williams, Tr. 2137) The letter was approved by the Board of Realtors on February 13, 1974, nearly a year before the Commission's complaint was filed. (I.D. 241) It is evident that owners could *not* sell land locally through the usual means of doing so -- by listing with a realtor and a multiple listing service.

Paul Heinz, an Albuquerque broker who was formerly a Rio Rancho salesman, testified that he had received a total of approximately 2,500 inquiries about the possibility of listing Rio Rancho lots. However, he was unable to negotiate a single sale for any of the 468 lot owners whom he convinced to pay him $25 (and later

"high pressure sales tactics," in conjunction with deceptive representations about growth, development, and investment value, negates those conditions and renders the respondent's sales price meaningless as an indicator of fair market value. *See Horizon, supra,* at 819.

37. Godfrey testified that, in his opinion, a typical one-acre lot at Rio Rancho was worth a minimum of $5,000 at the time of his testimony (1976). Since 1974, however, respondent's price for such lots has ranged from $6,200 to $7,100. (I.D.236) While selling land at a price in excess of its fair market value does not, in and of itself, constitute a violation of Section 5, this conclusion is obviously relevant to determining the reasonableness of respondent's claim that its sales prices were *below* fair market value.

$50) apiece as an advance on a sales fee. (Heinz, Tr.11323-24, 11336)

Respondent argues that the inability of owners to sell is due to the unfavorable publicity from the instant suit. The facts do not support this contention, since the experience of both Heinz and the Albuquerque multiple listing service occurred at least a year before the Commission brought suit.

Respondent argues that Judge Teetor ignored evidence in the record of resales by owners of Rio Rancho lots.[38] For the most part, such sales were either to local Albuquerque builders, who then used the exchange privilege to "cash in" the vacant lot for a smaller amount of land near the core developed areas,[39] or to

38. For example, respondent cites the results of a survey of Rio Rancho owners conducted by complaint counsel, which showed 106 sales. (CX 564-568; RAB 10) (The ALJ "adjusted" these figures to account for surveys which were undeliverable or unreturned, estimating a total 398 sales from *all* purchasers. (I.D. 248)) However, respondent also argues, somewhat inconsistently, that the ALJ erred in admitting the survey.

We agree with respondent that the survey was flawed in several respects. No one working on the survey had any significant expertise or experience in conducting surveys. (Schulman, Tr. 11537-538; Case, Tr. 11596) No procedures were established for testing validity or reliability. The low response rate (439 usable responses out of 1,976 questionnaire) is also disturbing. Finally, the fact that one of the complaint counsel was compelled to act as both an advocate and a witness in this case created a situation for bias which should have been avoided. These flaws, in our view, go to the weight and not the admissibility of the evidence. The possibility of bias and the lack of the usual survey controls compels us to give no weight to the complaint counsel survey.

We do not believe, however, that this holding affects the validity of the ALJ's findings on market value or any other finding.Contrary to respondent's assertions, the ALJ did not rely on complaint counsel's survey "heavily", but rather cited it as additional cumulative evidence confirming the lack of any active resale market. There is substantial record evidence to support that finding absent the survey.

39. The record also contains evidence of land auctions held in Albuquerque by Rocky Mountain Land Auction Company of Denver, Colorado, at various times during 1975 and 1976. (I.D. 222-224)Three builders testified as to the prices they paid for Rio Rancho lots at auctions. (I.D. 224) Complaint counsel's expert appraiser, Mann, also relied to some extent on the auction prices in arriving at his opinion of

friends, neighbors, or others who were not part of the Albuquerque local market. (*See, e.g.*, Keaveny, Tr. 20744; Estrema, Tr.15172-73) Moreover, the fact that some few owners were able to sell their land does not diminish the overwhelming evidence that the vast majority of lot owners who wanted to sell their land were simply unable to do so. Indeed, respondent in various SEC filings has admitted since *1969* that buyers may find it difficult to resell homesites. (CX 4 J; CX 1 K; CX 5 E)

Nevertheless, respondent's experts assert that the illiquidity is only temporary, and that eventually owners will be able to sell at a profit.Respondent's expert investment witness, Charles Elias, testified that investors must be willing to wait out a "holding period" to get by temporary conditions that might dampen sales. (Elias, Tr. 23940-42) He viewed a 10-15 year period as reasonable and said that a century might not be too long for some people.

Even assuming that it is likely that there will be sufficient local demand to sustain a viable resale market in the 10-15 year time period, an assumption contrary to the evidence, the fact remains that respondent did not market its land as a long-term investment and did not disclose the significant risk of illiquidity. Indeed, the

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the value of the eight typical Rio Rancho lots. (Mann, Tr. 3358, 3374-75)

The ALJ cites evidence that in the November, 1975, auction, there were about 3000 lots listed, the majority from Rio Rancho; only 65 were sold. (CX 391 p.2; I.D. 223) Respondent argues persuasively that this last evidence is not properly in the record. (RAB 9-10) Mann's testimony as to the auction is hearsay; see I.D. p.192, note *. Further, Heinz's testimony and 2 exhibits, CX 562 and CX 563, were stricken by the ALJ, only to be reinstated in the Initial Decision, without affording respondent an opportunity to cross-examine. I.D. 222, fn. ***; C. Ans. 9. We hereby strike CX 562 and CX 563 and Heinz's testimony about the auctions from the record.

We do not agree with respondent, however, that this is a reversible error. As the ALJ noted, the prices of the lots bought at the auction are in the record through the builders' testimony, and Mann was entitled to rely upon the builders' statements about prices in arriving at his opinion. All that is dropped is evidence that 65 out of something less than 3,000 Rio Rancho lots offered were sold, a fact which is not critical to either the ALJ's findings or Mann's findings, given the other evidence about the lack of any resale market.

net impression created by respondent's sales presentations was that profits could be expected quickly, certainly within a ten year period, and the investment was low-risk. In light of those representations, respondent's failure to warn purchasers that an extraordinarily long "holding period" -- in the range of twenty years or more -- might be required to realize a profit misled consumers into believing that the holding period was reasonably short-term. *See Horizon, supra,* at 814.

We affirm the ALJ's conclusion that there is no resale market for Rio Rancho land, either presently or in the foreseeable future. The preponderance of the evidence shows that, contrary to its representations, respondent's selling price for its Rio Rancho lots has always been well in excess of the fair market value. It is further plain that, without a foreseeable resale market, the market value of Rio Rancho land has not increased and bears no relation to the increase in selling prices contrived by respondent. Buyers have not realized any increase in market value for their land.[40]

(iii) *Conclusions*

The preponderance of the evidence shows that respondent, in several ways, misrepresented the likely effect of future growth and development on the prices and market value of Rio Rancho land. First, respondent misrepresented the nature of the "constraints" on Albuquerque's future growth which is claimed would funnel most of the residential development toward Rio Rancho. As we have seen, those constraints were, if anything, long-term constraints: even under the most optimistic population projections

40. We find no merit in respondent's argument that they were denied due process since they had no notice of the ALJ's findings that respondent's prices for Rio Rancho land were "unconscionable." (RAB 7; I.D. 237) It is plain from the context of the ALJ's discussion that his conclusion was more descriptive than legally meaningful. The "conscionability" of respondent's prices is not in issue here; whether they were, as represented, close to fair market value is the issue. We see no prejudice from the ALJ's description.

of the 1960's, there was sufficient land all around and in Albuquerque to ensure that most growth would go elsewhere than Rio Rancho for at least twenty years. As the rate of population increase dropped during the 1970's, that time-frame was pushed further into the next century.By that time, however, many of the legal "constraints" may well be dissolved altogether.

Second, respondent misrepresented the likely *rate* at which Rio Rancho would be developed. During the 1960's respondent grossly exaggerated the predicted population increase. Further, individual sales representatives promised that development could be expected within 3 to 5 years; reference to lots as "homesites" and comparisons to other "boom" towns reinforced that message. As we have seen, however, the only reasonable conclusion that could have been drawn from information available during the 1960's was that it was highly improbable that there would be any development in Rio Rancho until the mid-1980's, and that the bulk of Rio Rancho would remain undeveloped for years after that. Similarly, the only reasonable conclusion that could have been drawn from information available during the 1970's was that it was highly improbable that more than a fraction of Rio Rancho would be developed by the turn of the century.

Respondent represented, both directly and indirectly, that the rapid rate of expected development toward Rio Rancho made it virtually certain that the market value and prices of Rio Rancho land would rise rapidly as well, providing a handsome short-term return on the buyer's investment. Since most buyers were buying for investment purposes, such representations were plainly material to the buyer's consideration of Rio Rancho land as an investment opportunity. As we have seen, however, in fact it was highly unlikely that there would be any significant growth toward Rio Rancho for at least 20 years, and consequently, respondent misrepresented the likelihood that the market value of Rio Rancho land would increase within several years as a result of development pressures.

Appendix "B"

The preponderance of the evidence also demonstrates that respondent misrepresented the market value of Rio Rancho land. By setting its price well above the fair market value of the land, respondent led consumers to believe that the market value of Rio Rancho land was much higher than it actually was. In addition, respondent affirmatively stated that the price at which Rio Rancho land was offered for sale was *below* fair market value, a statement which the evidence shows is false. Respondent further misrepresented the market value of Rio Rancho land by making misleading comparisons to the market value of properties located near to Rio Rancho. The properties referred to were developed communities which bore little resemblance to the vacant expanses of Rio Rancho. (I.D. 198)

Further, respondent also misrepresented past appreciation of Rio Rancho's market value. Through annual and sometimes semi-annual price increases, respondent created the impression that the market value of Rio Rancho had similarly increased. In fact, the price changes had no relation to changes in the market value of Rio Rancho land. Because there was and is no demand for or resale market for Rio Rancho land, the market value of Rio Rancho had not increased.

Directly and indirectly, respondent also misrepresented the risks involved in the purchase of Rio Rancho land as an investment. Information about potential risks was plainly material to any investor evaluating an investment opportunity, including buyers and prospective buyers of Rio Rancho. Both through affirmative statements of safety, and the failure to disclose material facts concerning the risks of an investment at Rio Rancho, respondent represented Rio Rancho as a low-risk investment. In fact, however, there were significant risks. Because of the lack of a resale market for the immediate future, lots at Rio Rancho were illiquid and most could not be sold at any price. Further, it was highly probable that there would be little or no appreciation of Rio Rancho land for at least a 20-year period, and there was some risk that there would be none well into the next century, if ever.

Despite respondent's knowledge of these risks,[41] it failed to disclose them and led buyers to believe that the investment involved little or no risk.

Through all of these misrepresentations, respondent created the thoroughly misleading impression that Rio Rancho land was an excellent investment opportunity. As we have seen, the reality is quite different: contrary to respondent's representations, (1) the price at which Rio Rancho land was offered for sale was far above fair market value; (2) there were substantial probabilities that Rio Rancho would not appreciate in the short-term; (3) there was a significant risk that buyers would not be able to resell their land; (4) Rio Rancho land had not increased in value; and (5) there were significant risks to long-term appreciation, as well. All of this information was material to an investor considering

41. Respondent reported in its SEC filings as early as 1969 that buyers would face difficulty in attempting to resell land. Further evidence of respondent's knowledge that the sale of any land, including Rio Rancho, involved significant risks is demonstrated by the existence of a 10-point pamphlet entitled, "What You Should Know About Real Estate Ownership," prepared by respondent in 1974. (RX 1827) Among other things, the pamphlet warned that any real estate purchase should be for either use or possible long-term appreciation; that real estate lacks liquidity; that not all land will appreciate and that the future value of land is difficult to predict; that a long-term investment means 10, 20, even 40 years; that there should be no expectation of immediate financial return. (RX 1827) In addition, in May 1973, respondent included a rider in some contracts which contained significant disclosures about investment risks. (CX 449) The disclosures warned that the land was being purchased for long-term investment and that it was not presently income producing, and, most significantly, a warning that land may be an illiquid investment and that "customers may find it difficult to resell subdivided land while the Developer is actively selling homesites in the same development. (CX 449 B)

The record shows, however, that respondent made little or no use of the disclosure pamphlet described above. While it was prepared to be included in the contract packets to be sent to new purchasers *after* their purchase (Smith, Tr. 21028), in fact the evidence shows that it was not so used. The sales manager for Eldorado at Santa Fe, for example, testified that the brochure was just on display at the sales office. (Dautherty, Tr. 21165) He testified that it was not given to people who had purchased. (Tr. 21166) As for the contract disclosures, respondent included them only in sales made abroad after May, 1973, and only when the sale exceeded $30,000. (Tr. 7933; CX 449 B)

price, risks, and potential returns on investment. Given these facts, it is evident that the purchase of land at Rio Rancho was, in fact, a poor investment, involving substantial risk and a very low probability of achieving a reasonable return on investment in the short-term. We find that respondent's misrepresentations and failures to disclose material facts are deceptive acts and practices in violation of Section 5 of the FTC Act. See *Horizon, supra,* at 814.

Given that conclusion, it is also apparent that respondent's comparisons to land purchases which *were* excellent investments were misleading because Rio Rancho bore no significant relation to the examples cited. Citations to Albuquerque real estate, for example, referred to improved acreage located in totally different sections of the city. (I.D. 198) Such comparisons were misleading and deceptive because they have the capacity to deceive consumers into believing that Rio Rancho shared the same potential for development and profits as the examples cited. As such, these comparisons violated Section 5.

For similar reasons, we sustain the ALJ's finding that some of respondent's general land investment statements, even if generally true, (RAB 55) were deceptive in the context of selling the particular properties involved here. (I.D. 285-300) When stated as principles of general applicability, as they were here, respondent's representations clearly had the tendency to lead consumers to believe (in the absence of any disclosure to the contrary), that those representations also applied to the particular real estate investment opportunity being offered. Thus the references to profits made in real estate investments in other parts of the country are misleading where they bear no relationship to the properties at respondent's subdivisions.[42] For example, the comparison

42. It is well-settled that truthful statements may nevertheless be misleading and deceptive if material facts which are necessary to prevent deception are not also disclosed. See *e.g., Horizon, supra,* at 805,. n.6; *Bockenstette,* v. *FTC,* 134 F.2d 369, 371 (10th Cir. 1943); *P. Lorillard Co.* v. *FTC,* 186 F.2d 52, 58 (4th Cir. 1950).

to "bridges" which launched land booms in other areas had nothing to do with the "bridges" across the Rio Grande, which did not suddenly open new residential areas to a teeming metropolis. (I.D. 202; 287-289)Similarly, respondent's claim that real estate as an investment is always superior to insurance, stocks and bonds and savings accounts is misleading because the particular properties involved here, as discussed below, are *not* good investments.[43] As a consequence, these misrepresentations are all deceptive acts in violation of Section 5. (I.D. 202)

Misrepresentations of material facts are long been held to be an unfair, as well as a deceptive, practice. *National Trade Publications Service, Inc.* v. *FTC,* 300 F.2d 790 (8th Cir. 1962). In considering whether a practice is unfair, the Commission focuses primarily on the existence of unjustified, substantial consumer injury. As we stated in Horizon at 849-50:

> To be legally "unfair," consumer injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice at issue produces; and it must be an injury that consumers themselves could not reasonably have avoided.

The injury to consumers from respondent's deceptive representations is clearly substantial. As discussed later in the opinion, respondent, using a variety of high-pressure sales tactics, put pressure on consumers to sign the land sales contract before leaving the dinner sales party.[44] At that time, however, perspective buyers were relying almost exclusively on respondent's claims

43. Judge Teetor also found that the comparisons to other forms of investment were deceptive because the comparisons did not compare rates of return holding all other things equal. (I.D. 294-298) While such comparisons are obviously incomplete and faulty, we do not find them deceptive in the abstract, but only as applied to the particular investments being offered. For the same reason, we disagree with the Judge's finding that respondent's claim that real estate is a good hedge against inflation is deceptive in theory. It is, however, deceptive with respect to the properties here, which are poor investments.

44. *See* Part IV of the opinion, below.

that the land constituted an excellent, low-risk investment. Since most purchasers bought the land for investment purposes, it is clear that respondent's representations were not only material, but were indeed the direct inducement of the sale.

Respondents sold more than 75,000 lots at Rio Rancho alone. The average price for all of respondent's subdivisions ranged from $3232 (in 1969) to $4899 (in 1976). (I.D. 11) The ALJ found that those sales prices were anywhere from three to five times the actual market value of the lots. (I.D. 229) Since, by definition, the fair market value of a parcel is the price a knowledgeable buyer would be willing to pay, and at which a knowledgeable seller would be willing to sell, under conditions free of deception and coercion, the difference between the market value of the land and respondent's selling price affords a rough calculation of the total consumer injury caused by respondent's deceptive representations. Using an average sales price of $4065, that figure amounts to more than $200 million at Rio Rancho alone.[45]

The second test of unfairness is whether the consumer injury is outweighed by any countervailing benefits to competition and to consumers. The record reveals no countervailing benefits stemming from respondent's misrepresentations about Rio Rancho's investment value.

The final test of unfairness is whether the consumer injury could have reasonably been avoided by consumers. The buyers here were not sophisticated, experienced investors. Indeed, one of respondent's main pitches was that AMREP's solid reputation and its substantial experience as a land developer made it possible to offer even average persons an opportunity to invest in land. (CX 45 H; CX 6 D; CX 102 A) As a result, buyers rarely had information or experience to rebut respondent's representations. Nor were buyers likely to have any knowledge about respondent's subdivisions, which were located far away from the northeast

45. The figure is calculated by taking two-thirds of the estimated revenue obtained by selling 75,000 lots at an average price of $4065.

U.S. cities where most sales meetings took place. Further, respondent's presentation underscored the theme that, as a solid company listed on the New York Stock Exchange, AMREP could be trusted. (CX 102 A; CX 59) The glossy sales brochures, the slickly-produced films starring well-known political and show business personalities, and the representations that respondent was complying with detailed federal and state regulations and had been approved by state regulations (CX 456 I; CX 110 K), all led consumers to believe that respondent was offering a legitimate and potentially valuable investment opportunity. Respondent further discouraged purchasers from seeking advice from attorneys or other professionals. (Jarrett, Tr. 10340, Wise, Tr. 10939)

In addition to convincing unsophisticated consumers that they could trust respondent, respondent also used a variety of tactics to persuade buyers to sign a contract and keep up payments. To begin with, as discussed later, respondent frequently misrepresented the purpose of the dinner parties in its invitations, making it difficult for consumers to avoid being subjected to respondent's sales pitch, short of refusing to come to the dinner party at all. More importantly, and as discussed in more detail later in the opinion, respondent used a variety of high-pressure sales tactics and deceptive representations to persuade consumers to sign the land sales contract at the dinner sales party, primarily by convincing consumers that they could still cancel the contract afterwards. However, as also detailed later, respondents worked hard to keep buyers from cancelling within the 72-hour cooling off period or after visiting the land. Further, it was plainly costly for consumers to travel to respondent's subdivisions to inspect their land, which was a necessary precondition to the later cancellation right. After those periods had run, consumers were locked into a contract, which provided, among other things, that they would forfeit *all* payments already made if they defaulted. As the ALJ noted, respondent's "organized offense" was intended to make it difficult and costly for consumers to get an independent evaluation of

respondent's claims and to get out of the contract once it was signed in reliance on respondent's deceptive claims. Under these circumstances, we conclude that consumers could not reasonably have avoided the injury caused by respondent's representations.

We conclude that all three tests for unfairness have been met, and that respondent's deceptive representations about Rio Rancho concerning its development growth, and investment value constitute unfair acts or practices in violation of Section 5.

We find that the preponderance of the evidence supports the complaint allegations set out in paragraphs 11 through 23.

3. *Investment Representations about Silver Springs Shores*

(a) *Representations about Investment Value*

Silver Springs Shores consists of 18,500 acres of land about three miles southeast of Icala, a small city located in Marion County in the north central part of Florida. (I.D. 31-40) About 88 percent of the acreage has been platted; about 34 percent (5,521 acres) of its platted acreage had been sold or contracted for by 1976. (I.D. 34) While 19,426 lots had been sold, only about 700 homes had been built or were under construction at the time of trial. (I.D. 35) The immediate building area was served by electricity and telephone service, but there was no central water or sewer system, requiring residents to install a well and septic system at their own cost, estimated to be about $1200. (I.D. 332)[46]

46. In February, 1983, the General Development Corporation ("GDC") purchased AMREP Corporation's remaining residential and commercial property in Silver Springs Shores. On September 30, 1982, the Commission entered an order in this matter containing an agreement between the Commission and GDC. In return for the Commission's agreement not to consider GDC a successor or assign to AMREP Corporation as a result of the purchase of Silver Springs Shores, GDC agreed to undertake certain actions for the benefit of the consumer owners of Silver Springs Shores. Among other actions, GDC is obligated under the Order to offer to repurchase approximately 20,000 lots that have been deeded or will be deeded in the next five years.

Appendix "B"

Respondent's sales presentations for Silver Springs Shores emphasized its investment potential. Respondent's films, brochures, and dinner scripts underscored the explosive growth of population in central Florida, and the attendant increase in land prices. (I.D. 159-160, 205, CX 456 B; CX 65 A; CX 76 O) Representations that Florida land prices were "doubling and redoubling again and again: (CX 175 M) made clear the "exciting potential for profit" (CX 456 B) which respondent was offering. Such comparisons to central Florida land had the capacity to lead consumers to believe that Silver Springs Shores had the same potential for growth and quick profits as Florida land in general.[47]

Respondent's sales presentations also stressed significant growth in Ocala, the town closest to Silver Springs Shores. Noting that Ocala's population had increased an "astounding 66 percent" in ten years, respondent's brochure clearly implied that the population had increased because of net migration into the city. (CX 58 N; CX 73 A; I.D. 170) Respondent's film also created the net impression that Ocala's population was rising rapidly:

> ". . . a growth rate 340% greater that Daytona beach; 300% greater than Miami Beach. Already Ocala, faced by fast-rising population and real estate pressures, has expanded its city limits . . . and whenever dynamic growth like this occurs land prices tend to move up and up." (CX 175 D)

47. Respondent attempted to dispel the plain intent of its reference to profits in central Florida real estate with a small print disclaimer (at least for its main brochure) that: "Information obtained in this booklet is general to the central Florida area. Property offered for sale in Silver Springs Shores may or may not be affected by the events or predictions described." (CX 58 X, ;I.D. 160) We agree with the ALJ's conclusion that this disclaimer was unlikely to be effective in the context of respondent's total sales presentation.

Respondent's advertising made express the implied representation made above: that Silver Springs Shores "is in the path of tremendous growth." (I.D. 170; CX 73 A)

Respondent also represented that lots at Silver Springs Shores were like lots located in other AMREP property in Florida which allegedly had appreciated in value by $4,500 in five years. (I.D. 205)

While the evidence on resale representations is limited, the preponderance of the evidence shows that some of respondent's sales representatives also represented that there was presently an active resale market at Silver Springs Shores or that there would be no difficulty in reselling lots there. (I.D. 212)

Silver Springs Shores sales representatives, like their counterparts at Rio Rancho, referred to lots there as "homesites" and represented to potential buyers that development would occur rapidly, with utilities reaching their property within three to five years. (I.D. 336, 337) At one 1973 dinner party, a salesman went so far as to assure a potential buyer that a lot in an undeveloped area was fully developed, complete with streets, electrical lines, and sewers. (Consumer Muzzillo, Tr. 7244) Indeed, respondent's own national advertising referred to Silver Springs Shores as part of a "thriving developing community where streets and utilities are already in . . ." (CX 72, CX 78, I.D. 333)[48] Moreover, these development claims implied that there was, or would be in the near future, a viable community with an active resale market.[49]

In summary, we find that respondent represented that Silver Springs Shores was an excellent investment; that it would share in the growth in population of central Florida and Ocala, and that such growth would be substantial; that the land would appreciate

48. In light of the actual state of development at Silver Springs Shores, noted previously, such a claim was false and deceptive. (I.D. 333) This instance is the only one in which respondent misrepresented the actual state of development at one of its subdivisions.

49. As we noted in *Horizon, supra,* at 810:

> The effect of these representations on consumers cannot be underestimated: roads and utilities mean the possibility of communities, communities mean resale, and resale means profit.

in price as a consequence of the increased demand for residential land; and that there would be significant appreciation in the short term.

(b) *The Investment Value of Silver Springs Shores*

The ALJ found, and we affirm, that respondent deceptively represented the growth of Ocala, the town nearest to respondent's development in Silver Springs Shores. (I.D. 170) Ocala's population increase was due, not to in-migration as represented by respondent, but simply to a redrawing of the city's 1960 boundaries to encompass new areas. The population within Ocala's 1960 city limits actually declined from 1960 to 1970. (I.D. 171, CX 476, H, L) The record shows that the population increase was due almost entirely to capturing pre-existing population in the annexed areas.[50] While respondent asserts that it disclosed that Ocala's boundaries had been expanded in conjunction with the population growth claims, we find that such disclosure was not always made, and when it was, that it was unlikely to dispel the deceptive message that the Ocala area was experiencing substantial population growth.[51]

Respondent's claim that Silver Springs Shores was "in the path of development" is contradicted by the record evidence showing

50. CX 476, entitled "The Characteristics of the Population: (1970 Census) notes that parts of Belleview, Fort McCoy-Anthony and West-Fellowship divisions were annexed by Ocala. The population of these three areas was 26,717 in 1960, and had increased to only 30,893 by 1970. (CX 476 L, RAB 45)

51. For example, in the specific advertisement cited by ALJ, respondent failed to disclose that Ocala had expanded its boundaries. (CX 73 A, I.D. 170) Further, where the disclosure was made, it implied only that the boundaries were expanded *because of* substantial population growth. *See, e.g.*, CX 175 D, a party film script for Silver Springs Shores:

> . . . Ocala has jumped 88% in population in only 7 years . . . Already Ocala, faced by fast-rising population and real estate pressures, has expanded its city limits . . . as outlying areas quickly became suburbs . . . as suburbs quickly became cities . . .

The net effect of the claim was to enhance the image of Ocala as an area bursting at the seams with significant population growth caused by in-migration.

that land available for residential development in Marion County was in abundant supply. Regional Planner James Mims testified that as of 1977 there were at least 94 land developments in Marion County, totaling over 135,292 acres, with the ability to accommodate a population of 784,693.[52] (Mims, Tr. 6795-6796, 6802; I.D. 172) At the time of trial, it was expected that Marion County would reach a population of 138,300 by 1985. (Mims, Tr. 6793-94) Enough land had been subdivided by the time of the *trial* to house not only that population projection, but an *additional* 646,694 people.[53] City planner Richard Lewis testified that there was more than enough residential acreage in the city limits of Ocala alone to meet the anticipated growth of population through 2000. (Lewis, Tr. 6675-77, 6685) Taking a somewhat different approach, Judge Teetor applied the past rate of growth from 1960 to 1975 and concluded that there already was enough subdivided land in Marion County to last for 280 years. In light of the enormous supply of competing residential land, and the lack of any constraints which would funnel development toward Silver Springs Shores in lieu of the other areas, the only conclusion that could reasonably be drawn from all available information was that the probability of significant development of Silver Springs Shores was very low. Because of the abundant supply of available competing land, local demand for Silver Springs Shores was not likely to be significant until well into the next century, if then.

The evidence is plain that there is in fact no resale market at the present time for Silver Springs Shores. Testimony from several Ocala real estate brokers and the Chairman of the local multiple listing service indicated that while hundreds of Silver

52. Respondent incorrectly asserts that Mims'population figures pertained to a five-county region, rather than to Marion County alone. (RAB 45, Mims, Tr. 6812)

53. Regional Planner Mims testified that the University of Florida's Bureau of Economic and Business Research placed Marion County's 1975 population at 93,469 and predicted its 1985 population to be 138,300. (Tr. 6793-6794) Subtracting the projected 1985 figure from the present capacity of existing subdivisions (784,694) yields a figure of 646,694.

Springs Shores lot owners had expressed a desire to sell, only a few were successful in doing so. (Moutz, Tr. 6601-2; Kanninen, Tr. 6850-52, 6855) From April 1973 to December 1976, there were only four sales of vacant Silver Springs Shores lots through the multiple listing service. (Cepeda, Tr. 6530-5) One broker, Virginia Kanninen, testified that she had made three resales of lots, all at prices blow respondent's current list price for lots. (Tr. 6855, I.D. 268-270)[54] Indeed, respondent's own SEC filings admit that owners find it difficult to resell lots. (CX 5 E; CX 1 K)

Respondent's two expert witnesses, Professor Elias and Mr. Tischler, contend that, while Silver Springs Shores lots may presently be illiquid, the lots may still be a good investment if they are held on to for a longer period of time.[55] (RAB 55; RPF 85-93; Elias, Tr. 23830; I.D. 273-275) While in the abstract the point may be true, the difficulty with the argument is that the purchase was represented to potential buyers as an investment in which there was little or no risk (because the demand for land was so enormous) and a significant likelihood of profit. Respondent did not disclose that there were substantial risks, particularly in the short term, that the investment might be illiquid, or that the holding period needed to achieve a reasonable return on investment would likely be long term, longer than twenty or thirty years. In conjunction with the claims that the purchase of land was a good investment, the failure to disclose such material facts had the capacity to lead consumers to believe that the investment was for the short term and involved little or no risk.

Given the lack of foreseeable demand for land at Silver Springs Shores, the abundance of alternative land available for

54. As with Rio Rancho, we give no weight to evidence about resales contained in complaint counsel's survey (CX 566). *See* discussion, *supra*.

55. Respondent's expert witness Tischler also testified that he thought that a substantial percentage -- perhaps half -- of Silver Springs Shores owners would settle there. (Tr. 23331, 23453; I.D. 273) As discussed above in connection with Rio Rancho, this assumption is unreasonable in light of respondent's actual experience with its own projects and knowledge about the land sales industry generally.

residential development, and the lack of any active resale market at Silver Springs Shores, we conclude that it was highly unlikely that there would be substantial growth or development in Silver Springs Shores, particularly in the short term period of under 20 years. Consequently, future short-term growth and development was unlikely to have any effect on the market value of lots at Silver Springs Shores. Therefore, we find that respondent misrepresented the likelihood of future development and the effect of such development on prices. Further, the preponderance of the evidence shows that there is little likelihood that the market value of lots at Silver Springs Shores will increase, particularly in the short term, and that there is a substantial probability that buyers will be unable to resell their land. As a result, lots at Silver Springs Shores were not, as represented, excellent, low-risk investments but instead were purchases involving a substantial risk of illiquidity and little or no potential for profit, particularly in the short term. Respondent's misrepresentations of and failure to disclose such facts, which would be material to a buyer weighing the investment value of Silver Springs Shores, were deceptive acts and practices in violation of Section 5. For the reasons discussed previously, we find that such deceptive practices cause substantial, unjustified and unavoidable consumer injury, and accordingly, we also find that these practices are also unfair acts or practices in violation of Section 5.

4. *Oakmont Shores*

(a) *Representations about Investment Value*

Oakmont Shores is a 3,500 acre recreational/resort development adjoining a 56 mile long man-made lake in the Ozark country in southwestern Missouri. Respondent acquired the project from a bankrupt developer and began selling lots there in 1972. Out of a total of 2,300 platted lots, respondent sold 803 lots and deeded 29 more. (I.D. 47-48) Most lots lacked one or more utilities. (I.D. 341-359) In April, 1975, respondent abandoned its

plan to develop Oakmont Shores and reconveyed the land to the trustee in bankruptcy for the former owner. (I.D. 51)

Respondent's investment theme for Oakmont Shores, a recreational/resort development, took a slightly different tack than in its other projects. The main theme is captured in the title of respondent's main promotional film, "A Race for Space." (CX 171) The film claimed that recreational land in general was getting scarcer and the standard dinner script stated that the price of "good lake land" was skyrocketing. (CX 102 C; I.D. 178-179) The script concluded: "The closeness of Oakmont Shores to the second largest man-made lake in the nation means that demand -- and prices -- can be expected to go only one way -- up!" (CX 102 C) The film cites a "government report" which found that the property adjacent to Table Rock Lake had increased in value 535% in seven years. (CX 171 I) Respondent's sales representatives portrayed Oakmont Shores as a good investment, which would double or triple in value in several years. (I.D. 207) The image of a rapidly developing recreational community was fostered by reference to the lots as "homesites." (I.D. 341) The net impression from these representations was that recreational land around Table Rock Lake was in high demand and that therefore the market value of such land, including Oakmont Shores, would continue to increase, making the purchase of a lot a good investment.

(b) *The Investment Value of Oakmont Shores*

Contrary to the representations made by respondent, there is no demand for lots at Oakmont Shores, largely because of the abundant supply of recreational/resort land adjoining Table Rock Lake in competition with Oakmont Shores. (I.D. 181) While no surveys or projections were made which would indicate how rapidly the area around Table Rock Lake could be expected to develop, there was substantial capacity for development which made any expectations about an increase in market value at Oakmont Shores speculative, at best, particularly within the short

time frame. For example, nearly 75% of the land around Table Rock Lake had not yet even been subdivided. (McGee, Tr. 9175)

Indeed, there was, by the time of trial, virtually no resale market for Oakmont Shores lots. Three different real estate brokers testified that, despite receiving numerous inquiries from land owners about the possibility of selling, only one lot was actually sold. (I.D. 278-280) Again, respondent has recognized the difficulty of resale in its SEC filings. (CX 5 E, CX 1 K)

In view of the abundant supply of competing land and the lack of a resale market for Oakmont Shores, it was highly unlikely that lots at Oakmont Shores would be developed in the foreseeable future or that the market value of such lots would increase as a result of development or the increasing scarcity of land available for recreational development. As a result, lots at Oakmont Shores were not, as represented, excellent investments, but instead were purchases with little possibility of appreciation in the foreseeable future and with a substantial risk of illiquidity. Respondent's misrepresentations about the investment value of lots at Oakmont Shores were deceptive practices in violation of Section 5. Further, it was a deceptive practice violating Section 5 for respondent to claim that prices had risen 535% over a seven-year period without disclosing that during that seven-year period, Table Rock Lake was being constructed. Any increase in property values during that time was likely to be highly atypical. (See McGee, Tr. 9154) The use of atypical data, without disclosure that they are atypical, is misleading, and therefore a deceptive practice under Section 5.[56] These deceptive practices are also unfair acts or practices in violation of Section 5 because they cause substantial, unjustified, and unavoidable consumer injury.

56. *See, e.g., Horizon, supra*, at 806; *National Dynamics Corp.*, 82 F.T.C. 488, 564-65 (1973), *aff'd in part and remanded in part*, 492 F.2d 1333, 1335 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974); *reconsideration*, 85 F.T.C. 1052, 1053-54 (1975).

Appendix "B"

5. *Eldorado at Santa Fe*

The smallest of respondent's projects, Eldorado at Santa Fe, consists of about 6,000 acres located 14 miles southwest of Santa Fe, New Mexico. (I.D. 41-42) Respondent started selling lots in January, 1973; by 1976, 351 lots had been contracted and an additional 98 lots had been deeded. However, as of 1975, there were only 21 occupied homes, and few parts of the subdivision had utilities. (I.D. 43; 338-339)

Complaint counsel produced only a limited amount of evidence for the record concerning investment representations made by respondent at Eldorado. On the basis of this limited evidence, we make no findings about specific investment representations.

The ALJ found that there was a plentiful supply of land available for residential development in and around Santa Fe, making respondent's claim that growth was blocked in all directions but to the South false and deceptive. Santa Fe City Planner Moul calculated that enough land existed to support 63,400 people (Tr. 10483), about the size of the County's probable population growth for the next 51 years. (I.D. 177) That calculation excluded two areas, the Weil Ranch and the Jarrett Ranch, which totaled 49,000 acres. (I.D. 176-177)

The ALJ found, however, that the record did not support a conclusion as to the investment value of Eldorado lots. (I.D. 276) While there plainly is no demographic pressure forcing development towards Eldorado in rapid fashion, there is no evidence about the present market value of Eldorado lots or whether there is an active resale market. Thus, we find the record does not support a finding that the respondent has deceptively marketed Eldorado land as an excellent investment.

D. *Respondent's Defenses*

1. *The "Exchange Privilege"*

Respondent asserts that, even if buyers of Rio Rancho land were unable to sell their land, they were not injured because they

were able to exchange it for a lot of "comparable value" whenever they were ready to build on it.[57] Respondent estimates that the exchange privilege alone is worth $3500. (RAB 52-54)

In reality, the exchange benefit provides very little of worth. In the first instance, as respondent belatedly disclosed in its property reports, respondent is not in a position to honor the exchange privilege if, in fact, a substantial number of buyers want to build on their lots. (CX 162 J, CX 163 H)

More importantly, the exchange privilege is so restricted by conditions that its value is very limited. All that the privilege entitles the buyer to is the right to a lot in the building section which is of "comparable value" to the buyer's vacant lot. Since the market value of a vacant lot is much lower than the market value of a building lot with utilities near the core developed areas (I.D. 221), respondent may give substantially smaller lots in the building area, or charge additional fees, in complete compliance with the exchange provision, and indeed frequently has done so.[58]

57. The provision in the reservation and purchase agreement for Rio Rancho Estates provides:

> 4. If when Buyer is ready to build a home, utilities have not yet reached his site, Seller will exchange a building lot of comparable value in an area already served by utilities, for a single lot of Buyer. (CX 155)

Earlier contracts provided, in contrast, that the Buyer would be entitled to a lot of equal size in the core area served by utilities. (CX 313 A; CX 266 B; CX 286 B; CX 273 B) This right was watered down over time to a right to a lot of "comparable value," a term which is not defined in the contract. Contrary to some representations (*see, e.g.*, Benfante, Tr. 4312; Hurza, Tr. 2402), buyers were not entitled to an equal size lot in the building area at no additional cost.

Rio Rancho was the only project in which respondent offered the building exchange privilege. In Silver Springs Shores, buyers were given the opportunity only to trade a lot for another within 5 years of the purchase. (CX 323; CX 315; CX 320)

58. Indeed, the complaint alleges in paragraphs 44-45 that respondent misrepresented the operation of the exchange privilege provision by failing to disclose that, in practice, respondent attempts to get buyers to accept smaller lots and to make additional payments. The ALJ made no findings on these allegations. Our own review of the record does not demonstrate sufficient evidence that respondent misrepresented the exchange privilege to support a finding of violation of Section 5.

(*See, e.g.*, Wise, Tr. 10946-49; Salesman Kimmel, Tr. 3903; Bradley, Tr. 2168; Douglas, Tr. 10076-77; Lobianco, Tr. 4748-49; Sanchez, Tr. 9889-90). In essence, the phrase "comparable value" gives respondent discretion to determine what to provide in exchange for the owner's vacant lot. In addition, the right applies only to the first half acre lot; there is no exchange privilege for any additional lots owned. (CX 162 J)

But even more fundamentally, the privilege was of no value to someone holding the land simply for investment, rather than for eventual relocation or retirement, since the exchange privilege applied *only* if the *buyer* was "ready to build." A buyer holding the lot for investment has no interest in building a house, but only in the market value of the vacant lot. It is true, of course, that an investor can sell the vacant lot to a third party who is ready to build. The third party, in turn, can use the exchange privilege to get a lot with utilities.[59] But the third party will only be willing to pay a price commensurate with the fair market value of the building lot -- which, in turn, is set by the fair market value of the *vacant* lot. Ultimately, then, an investor can realize a profit on his vacant lot only if the fair market value of the particular vacant lot he owns increases. The exchange privilege is largely irrelevant to the investor. Indeed, the very fact that there is no local resale market and no demand for vacant land underscores the fundamental worthlessness of Rio Rancho as an investment because it signals that there is no market for lots *even with the exchange privilege.*

2. *Disclosures*

Respondent strenuously argues that the ALJ's decision ignores the fact that consumers were given "probably the most thorough set of disclosure documents relating to a consumer

59. Indeed, most of the few sales of vacant lots at Rio Rancho were made to builders who bought a number of vacant lots and traded them in for a smaller area in the project's building area. (Bradley, Tr. 2168; Douglas, Tr. 10076-77; I.D. 222-224)

product that was available in the entire American economic system." (RAB 53)

As permitted by OILSR regulations,[60] respondent chose to supply property reports at the dinner parties and afford consumers a 72-hour cancellation right rather than provide the report 48 hours before a purchase. (I.D. 80) As a result, although respondent complied with OILSR regulations, it is clear that the tightly organized and smoothly presented sales presentations gave potential buyers very little time to consider the property report disclosures *before* they signed contracts.

Further, the complaint charged that the property reports were distributed in a manner calculated to prevent buyers from making any effective use of the disclosures, and that such practices were unfair and deceptive acts or practices in violation of Section 5. While there was some evidence that property reports were effectively concealed at the dinner parties (for example, by putting them under stacks of documents, Jarrett, Tr. 10337), and that reports were delivered late or not at all, the ALJ did not conclude that respondent failed to provide property reports. (I.D. p. 100, note *) The ALJ did note that respondent's sales presentations did not mention the property report and that, while respondent did not "officially condone" the effective concealment of property reports, "it did nothing about it, either, despite our reasonable certainty that some effective concealment did occur." Nevertheless, we do not find the evidence sufficient to support a finding of a Section 5 violation with respect to these practices.

More significantly, even if purchasers had a limited opportunity to look at the property report, it is by no means clear that the disclosures in the property report would have been sufficient to dispel the specific investment value representations being made by respondent. For the most part, the information contained in property reports is concerned with the condition of the land in question, its suitability as a homesite, the present extent of development, the availability and cost of utilities and other amenities,

60. 24 C.F.R. § 1710.208(f)(3).

the likely pace of future development, and the developer's contractual obligations (or financial protections) to ensure the promised development. Such information, while certainly helpful to a consumer who is evaluating land as a possible retirement location or primary homesite, is less useful to an investor evaluating the value of respondent's land as an investment. For example, unlike many other land developers, respondent was not contractually obligated to provide *any* development. Instead, it represented that development would occur as a result of market forces, not from its own actions. Thus, there is relatively little in the property report which could assist a potential investor in evaluating the respondent's sales claims that development -- and profit -- would be rapid based on scarcity of residential land, past increases in property value, and expected population growth. The property reports thus contained little information to challenge the illusion crafted by respondent's carefully designed sales presentation that respondent's subdivisions are the investment opportunity of a lifetime. Consequently, compliance with OILSR disclosure requirements would not be sufficient to disabuse consumers of the impressions created by the deceptive and misleading statements, as well as the deceptive failure to disclose material facts, made by respondent in its sales presentations.[61] We therefore reject respondent's contentions that the property reports provide a defense to this action.

3. *The Visitation Privilege*

Respondent asserts that it encouraged buyers to visit their lots and afforded them an opportunity to cancel their purchases for any reason after they had an opportunity to visit, as long as that was within six months after signing the contract.[62] (I.D. 85) While the record does not indicate what percentage of buyers actually visited their land within the six month period, either with the company's tour or on their own, relatively few of those who

61. Cf. *Horizon, supra*, 859.

62. All of respondent's subdivisions with the exception of Oakmont Shores offered the six-month cancellation privilege. (I.D. 85, note)

did come cancelled their contract, while others purchased even more land. (I.D. 88) Respondent asserts that under such circumstances, it is impossible to conclude that buyers were deceived. (RAB 53)

If respondent's claims about the state of development had been deceptive, which we have found that they generally were not, respondent's argument would have greater force. Clearly, if purchasers had been misled about the present state of development, a trip to respondent's subdivisions would quickly reveal the deception. For example, while a visit to Rio Rancho could have been of some help to an investor, particularly if the trip was made individually and not as part of respondent's organized tour,[63] argument that the visitation privilege cured any possibly deceptive representations. it was still unlikely to overcome the main message of respondent's representation: that substantial local demand was just around the corner. While obviously buyers could see the vast amounts of undeveloped land around Albuquerque and the enormous size of Rio Rancho, they had no way to evaluate how quickly that land would become developed or whether it was property that was subject to development constraints. Respondent's tour guides sought to minimize the significance of the vast undeveloped acreage by telling buyers, according to the standard script: "Although it appears that there is a lot of open land in New Mexico, most of it is either owned by the government in the form

63. As the ALJ found, respondent's organized tours of Rio Rancho were designed to sell purchasers on the advantages of the Southwest and to reinforce the theme of rapidly rising demand for Rio Rancho land. (I.D. 89-92) Respondents closely-controlled tours left little time for tour participants to inspect their lots or to do any independent research. The effectiveness of respondent's tour is reflected in the fact that nearly a third of all purchasers who visited their lots on their own cancelled their purchases, compared to only ten percent of those taking respondent's tour.

The complaint charged that the use of the tour to vitiate the six-month refund was unfair. (Par. 43) The ALJ made no findings on this part of the complaint. Our own review of the record does not support a finding of unfairness, and we accordingly decline to find a violation of Section 5 as charged by this paragraph of the complaint.

of military installations, Indian reservations or held by land grants." (RX 268 D) While literally true, the statement reflected the buyers' inability to judge for themselves the validity of respondent's claims about the scarcity of land and the likely pace of development. To calm any additional lingering doubts, respondent's sales personnel reminded buyers of the exchange privilege, which seemed to offer protection if the pace of development was slower than predicted. (I.D. 93-95) Under these circumstances, we do not find persuasive respondent's argument that the visitation privilege cured any possibly deceptive representations.

4. *Representations were "Opinion"*

Respondent also argues that it cannot be held liable for its representations concerning the expected future growth of Albuquerque toward Rio Rancho and its statements about the future market value of its lots because such representations are merely a matter of "honest" opinion or prediction which cannot be fraudulent under common law. (I.D. p. 266-267; RAB 43)

Commission cases reflect the common law's standard that certain statements of opinion, such as "puffery," lack the capacity to deceive consumers. *Cologate-Palmolive Co.* v. *FTC*, 310 F.2d 89 (1st Cir. 1962); *Bristol-Myers* v. *FTC*, 185 F.2d 58 (4th Cir. 1950); *Kidder Oil Co.* v. *FTC*, 117 F.2d 892 (7th Cir. 1941).[64] Statements of value, and predictions of events in the future, can be expressions of opinion which are not actionable under common law. Prosser, *The Law of Torts*, § 109 (1971).

At the same time, the common law has developed a number of exceptions to this general principle. It is well-settled, for example, that the expression of an opinion carries with it an implied statement of fact that the opinion is honestly held and that the speaker knows of no facts which would preclude holding such an opinion.

64. Since the Commission's cease and desist powers are more in the nature of a common law equitable remedy than a legal remedy for damages, it is appropriate that Section 5 actions, like equity actions at common law, recognize the "opinion" defense only in a very limited set of circumstances. *See* Prosser, *The Law Of Torts*, § 109 (1971).

Irwin v. *United States*, 338 F.2d 770, 773-74 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965); *United States* v. *Rubinstein*, 166 F.2d 249, 255 (2d Cir. 1948), *cert. denied*, 333 U.S. 868 (1948); *United States* v. *Grayson*, 166 F.2d 863, 866 (2d Cir. 1948); Prosser, *The Law of Torts*, § 109 (1971). Further, where a speaker holds himself out or is understood to have special knowledge not possessed by the listener, the speaker's opinion carries with it the implied statement of fact that the speaker knows of facts which support the opinion. *Magnaleasing, Inc.* v. *Staten Island Mall*, 428 F. Supp. 1039 (S.D.N.Y. 1977), *aff'd*, 563 F.2d 567 (2d Cir. 1977); *Vertes* v. *G.A.C. Properties, Inc.*, 337 F. Supp. 256, 261 (S.D. Fla. 1972); Prosser, *supra*, § 109. Both situations involve special circumstances which make it probable or reasonable for the listener to accept and rely upon the speaker's opinion, and in such cases, the "opinion" defense is not available. Prosser, *supra*, § 109.

The evidence shows clearly that respondent knew facts which would have precluded a reasonable person from expressing the "opinion" about the rate of expected growth to the Northwest and its effect on property values at Rio Rancho.[65] Most significantly, respondent received actual notice in 1965, from its own planning consultant, that there would be no local demand (and consequently, no increase in market value) for Rio Rancho land for at least twenty years. Further, during the 1960's, respondent had

65. In addition, it is also clear from the evidence that AMREP, with the exercise of reasonable diligence, should have known of facts inconsistent with its opinion about the rate of growth to the Northwest and its probable effect on property values at Rio Rancho. For example, AMREP should have known that buyers were unable to resell lots through the Albuquerque multiple listing service, and that such fact meant that the purchase of land at Rio Rancho involved a substantial risk of illiquidity. Representing that the purchase of land at Rio Rancho involved no risk was, at best, a negligent statement. Declarations of opinion made with negligence or with reckless disregard for the truth are actionable under common law. *United States* v. *Love*, 535 F.2d 1152, 1158 (9th Cir. 1976), *cert. denied*, 429 U.S. 847 (1976); *Cameron* v. *Outdoor Resorts of America*, 608 F.2d 187 (5th Cir. 1979), *reh.* 611 F.2d 105 (5th Cir. 1980).

actual knowledge of the only official population projections for that area, placing predicted population growth as one-third to one-half of that being predicted by respondent. (I.D. 180) It knew, from those studies, that the official planning agencies responsible for development were of the opinion that there was still enough available land to meet the highest reasonable population growth for at least forty years. Further, it knew some of these "constraints," like the title disputes in the Pajarito and Atrisco land grant areas, were legal ones which could be resolved over time. It was also put on notice in 1970 that population growth had significantly slowed, pushing off any pressure to grow toward Rio Rancho until the turn of the century. Yet in 1971, it purchased an additional 31,000 acres to sell as "investment opportunities."

Given these facts, no reasonable person could have honestly stated that the purchase of land at Rio Rancho was an excellent, low risk investment, particularly in the short term. Accordingly, we find that AMREP's opinion as to the rate of growth to the Northwest and the likely effect on Rio Rancho market values was not honestly held, and was a misrepresentation of its actual beliefs and knowledge. The "opinion" defense does not protect such misrepresentations.

AMREP went even further, however, and represented itself as a real estate investment expert which ordinary, inexperienced consumers could rely upon. Respondent represented itself as a community developer -- a big, reliable and financially sound company, listed on the New York stock exchange, with a proven track record of developing award-winning, progressive communities. (CX 102 A, CX 59 H) Its sales materials frequently referred to AMREP's experience in successful real estate ventures, citing the increase in land values in those projects. (CX 456 G; CX 6 D; CX 102 A; CX 109 F) Representations such as these plainly were intended to make potential buyers trust AMREP and put faith in its ability to make safe, excellent investments. By touting its expertise and experience, respondent claimed to have superior knowledge about land values, population trends, and community

development. Further, respondent wrapped itself in the protective coloration of state and federal regulation. AMREP's presentations referred to the fact that it had complied with state regulations, and in some instances had the active approval of state regulators. (CX 456 I; CX 110 K; CX 112 E, 112 H) Such representations contributed to the impression that respondent was offering a legitimate investment opportunity and that its claims could be trusted because they were strictly supervised by state and federal regulation.

Respondent's representations about likely rates and directions of growth and the probable effect of such development on property values were clearly material to potential buyers trying to evaluate the investment value of respondent's land. Buyers were at a distinct disadvantage to AMREP in having access to the information which was relevant to the investment decision. Most sales, for example, occurred in the northeastern United States, far from the sites of the subdivisions involved here. It would not be practical or feasible for buyers to attempt to conduct absorption studies to corroborate AMREP's claims, particularly in the very brief time frame respondent permitted for a decision. Even visiting the land, as we discussed above, was insufficient to give buyers the information they would need to determine whether AMREP's claims were reasonable.

In such a case, where the seller has unique access to critical information, where the buyer cannot reasonably obtain the information, and where the seller has been portrayed as a legitimate, recognized expert with the intention to induce reliance, the seller cannot escape liability for making deceptive statements in the form of an "opinion." It is evident that respondent, contrary to its implied statement, had no reasonable basis for its opinion concerning the rate of growth toward Rio Rancho and the probable effect of such development on market value. As a result, it misrepresented material facts. Such misrepresentation, which would be

actionable even under common law, violates Section 5's proscription of deceptive practices. Accordingly, we reject AMREP's "opinion" defense.

IV. *Marketing Techniques*

The complaint also charged that respondent used a number of standard sales practices which, taken together, made it very difficult for buyers to make a considered, informed decision, and that such practices constituted unfair or deceptive acts or practices in violation of Section 5.

The complaint alleged that respondent got buyers to come to its dinner parties by misrepresenting the purpose of the meetings, which was, of course, to sell land at respondent's subdivisions. (Complaint Paragraphs 9-10) In addition, buyers were led to believe that the sales subsidiaries sponsoring the meetings, usually bearing names like ATC Realty Corporation, had no connection with AMREP. (Complaint Paragraph 50)

Other sales practices were designed to put pressure on buyers to sign a contract at the dinner party. To that end, the complaint charged that respondents deceptively represented that buyers must buy lots immediately because lots would soon be unavailable or desirable locations would be gone. (Complaint Paragraphs 28-31) It further charged that respondent engaged in an unfair practice by discouraging buyers from obtaining counsel or outside assistance. (Complaint Paragraph 47) Finally, the complaint alleged that respondents deceptively represented to prospective purchasers that signing the land sales contract, which contained vague and confusing terms, involved no binding obligation since buyers had a right to cancel. (Complaint Paragraphs 38-39)[66]

66. The complaint also charged that respondent represented that buyers moving to Rio Rancho would have no difficulty finding jobs of similar nature and pay to those they presently had, and that such claims were false and deceptive. (Complaint Paragraphs 32-33) The ALJ found that complaint counsel had failed to carry their burden of proof on the issue (I.D. 360-363, p. 268) and complaint counsel have not appealed that finding.

Appendix "B"

Numerous invitations in the record show that the dinner meetings were represented to be presentations of "general information" about such topics as life in the Southwest, retirement on a limited income, real estate investments, or vacations in the Southwest, not a sales presentation. (CX 143; CX 22; CX 26; CX 27) Nevertheless, we decline to find that such representations were deceptive in that they failed to disclose that there would be an effort to sell something at such meetings. We think it likely that most consumers, receiving such invitations for a free dinner, were likely to assume that there would be some sales presentation, at least in the absence of a statement that clearly suggested otherwise.

We also find that complaint counsel failed to carry the burden of showing that respondent's failure to disclose that the sales companies were wholly-owned subsidiaries of AMREP had the tendency or capacity to deceive buyers. While one consumer testified that she understood the sales representative to be an "independent" real estate broker, and thus a source of objective information (Gray, Tr. 5418-19), the preponderance of the evidence shows that the sales subsidiaries routinely revealed that they were "representing" particular subdivisions. (CX 109 B, CX 111 A-B, CPF 243) Whether the relationship between AMREP and its sales representatives was one of agency or of ownership seems unlikely to be material to prospective buyers. In either event, buyers should have known that the sales representatives had a clear interest in selling the particular subdivision and that they were representing respondent's interests. We accordingly decline to find a violation of Section 5 on these charges.

One of respondent's selling techniques was to convince prospective buyers that only a few lots were currently available and that those that were left were going fast. Sales representatives told

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The complaint also charged that respondent represented that financing would be easy to obtain when, in fact, some buyers had difficulty in arranging financing. (Complaint Paragraphs 51-52). The ALJ made no findings on this issue and we find no evidence cited which bears on this issue. Accordingly, we make no findings on this complaint allegation.

buyers that the land was being sold fast and that buyers would "never have the opportunity again." (Acree, Tr. 8866; Wise, Tr. 10936; Weber, Tr. 8943) In addition, in order to implant this impression in prospective buyers' minds, respondent used allocation sheets, holds, and deletions. Although respondent had a large number of lots available for sale at each of its subdivisions, the sales representatives were given allocation sheets before each dinner party which listed the small number of lots that would be available for sale at that particular party. (ID 68) If a potential customer demonstrated any interest in a particular lot, the sales representative would jump up, raise his hand and call out a hold on that particular lot. While the purpose of this activity was purportedly to avoid duplicative purchases, respondent's actual reason for mandating its use at dinner parties was to create excitement and to suggest that the available lots were going fast, generating a sense of urgency in the room.[67] (ID 68-9 note*) If a lot was sold, sales representatives were instructed to call a deletion from the allocation sheet. As ex-sales representatives explained, deletion were called for "general motivation in the room" (Kimmel, Tr. 3890) and "to create enthusiasm." (Bondy, Tr. 7512) Not satisfied with the enthusiasm created by holds and deletions after actual sales, one former sales manager testified that occasionally deletions were called even though a lot was not sold. (Bondy, Tr. 7512-13)

Respondent's "holds" technique was carried over to the time when the lot owners visited their lots. All salesmen taking homesite owners to see their lots were instructed to leave their two-way radios on in order to communicate with headquarters and to call holds for homesite owners who wanted to buy or

67. Respondent's sales training manual describes the purpose of the allocation sheets and hold calls as follows:

> "You will be supplied with an allocation sheet for the party. As allocations are sold, they will be called off from the speaker's platform and each man should delete it from his list. This shows activity and will help stimulate people to make up their minds quickly or the allocation under discussion will be gone." (CX 39 V, CX 309 R)

exchange for other lots. The basic purpose of these "site holds" was to create an impression of a bustling trade in lots much the same way holds were used to create excitement at respondent's dinner parties. (ID 92)

The sense of urgency created by affirmative representations and the use of the allocation sheets, holds, and deletions was, however, completely contrived. There has never been a scarcity of unsold lots at any of respondent's four subdivisions.[68] (CX222a-d)

Respondent's sales representatives were also well-versed in the various ways of putting pressure on buyers to "close" the sale at the sales presentations. (I.D. 58-79) Among other tactics, the sales representatives disparaged professional advice and discouraged buyers from taking home copies of the contract to examine. (I.D. 60-61; Jarrett, Tr. 10340; Wise, Tr. 10939; Bondy, Tr. 7470; McCorkle, Tr. 2234) Sales representatives would "assume the sale," filling out contracts with all the required information even if the buyer informed the sales representative that he or she was not interested. (I.D. 74) If a sales representative was having difficulty in making a sale, a "takeover" sales representative, often represented as someone with special "expertise," would move in on the stubborn sales prospects. (I.D. 76-79) Questions about the security of the investment were routinely answered with references to AMREP's established reputation, size, and listing on the New York Stock Exchange, or the pervasive regulations and review of land offerings by state and federal governments. (Wise, Tr. 10933-34; Bondy, Tr. 7494) Prospects who continued to balk at signing the contract immediately were assured that signing created no obligation on their part, since they had a right to cancel for any reason within 72 hours or to cancel after inspection within six months, and that signing the contract was only a "reservation" of a particular piece of land. (I.D. 60) Once a buyer

68. More than 25% of all Rio Rancho lots, 33% of Silver Springs lots, and 60 % of Eldorado and Oakmont Shores lots, remained unsold by the end of 1975. (CX 222 a-d)

signed a contract, sales representatives used a number of techniques to ensure that the contract was not cancelled during the three-day cooling off period, including contacting the buyer the next day and congratulating them and inviting them to another free dinner party. (I.D. 83-84)

The ALJ found that such "high-pressure marketing techniques" were unfair methods of competition and unfair and deceptive acts and practices. (I.D. p. 264) While not finding such tactics to be deceptive in and of themselves, the ALJ found that they were nevertheless deceptive because they tended to "contribute" to the consumer's ultimate deception by increasing the likelihood that the buyer will act on other deceptive statements. In addition, he found them to be unfair practices because they reduced the consumer's ability to "react carefully and rationally to what they are hearing." (I.D. p. 264)

While we are in essential agreement with the ALJ that these practices violated Section 5, our analysis differs to some extent. Some of respondent's express claims were simply false. For example, the practices of announcing a deletion when no lot had in fact been sold was plainly deceptive. Similarly, the description of the contract as a "reservation," rather than as a land sales contract, and the representation that signing the contract imposed no obligations, were misleading since the terms of the contract clearly bind the purchaser to certain obligations unless the purchaser takes affirmative acts to avoid them.[69] Such misrepresentations of material facts are deceptive under Section 5.

While not deceptive standing by themselves, respondent's use of holds, allocations and deletions, in conjunction with its other affirmative statements emphasizing limited lot availability and

69. While the ALJ apparently found that the portion of Complaint Paragraph 38 charging respondent with "obscuring the legal or practical significance of signing a contract" to be "too obscure for us to comprehend," (I.D. p. 5), he clearly did not dismiss all of paragraph 38 and 39 charging respondent with misrepresenting the legal effect of signing respondent's contracts, as suggested by respondent. (RAB 67-68) Indeed, the ALJ specifically included an order provision addressing the practice. (I.D. p. 274)

the need for urgent action, reasonably could lead consumers to believe that they were required to purchase respondent's land immediately in order to ensure an opportunity to purchase, contrary to fact. Under such circumstances, respondent's use of holds and deletions was a deceptive practice in violation of Section 5.

The other sales tactics used to pressure buyers into signing a contract immediately -- disparaging professional assistance, discouraging buyers from taking home the contract, "assuming the sale," using "takeover" sales representatives and various reinforcement tactics used to keep the buyer contented during the 72-hour cancellation period -- may well have amounted to an unpleasant "hard sell," but they are not, without more, legally "unfair." As we stated in *Horizon*, we do not accept "unwarranted pressure" as the test of unfairness under Section 5. *Horizon, supra*, at 841.

Where, however, such marketing tactics occur in a context of pervasive deception as to material facts, such practices can be deceptive acts or practices proscribed by Section 5. *Horizon, supra*, at 841. Here, as discussed above, respondent's land was not, as represented, an excellent, low-risk investment, but instead a poor investment with substantial risk. Further, contrary to respondent's representations, there was no urgency to purchase lots at respondent's subdivisions since there was a substantial supply of lots. Finally, respondent misrepresented the binding nature of the sales contract. The "hard sales" tactics referred to above assisted respondent in making it likely that buyers would legally bind themselves in reliance on those deceptive representations, and to reduce the risk that buyers might obtain outside assistance or other information which might alert them to the deceptive character of the claims. Such tactics facilitated respondent's efforts to mislead consumers and accordingly are in themselves deceptive practices which violate Section 5.

Appendix "B"

V. *Contract Provisions*

The complaint charges that AMREP violated Section 5 by including in its standard land sales contract several provisions which were unfair to purchasers. The ALJ agreed, finding that four particular provisions violated the prohibition on unfair practices set out in Section 5: (1) a provision requiring the purchaser to pay interest on the unpaid balance of the purchase price; (2) a provision restraining the alienability of the purchased lot; (3) an integration/disclaimer clause; and (4) a provision requiring the forfeiture of all payments made upon the purchaser's default, as liquidated damages.

For the reasons noted below, we reverse the ALJ with respect to the first three provisions, and uphold his ruling with respect to the forfeiture provision.

In each of AMREP's four developments, it used a standard form contract, called a "Reservation and Purchase Agreement," as the sales agreement. Under the terms of the agreement, purchasers typically made a down payment of 10 percent of the "delayed payment price," paying off the balance in monthly installments over a period of five to eight years. (I.D. 10) Until all payments were made, AMREP retained title, use and possession of the lot; in the event that the buyer defaulted at any time, AMREP was entitled to retain all payments (including interest, taxes, and assessments) made by the buyer as well as to recover all rights to the lot.

In finding that several of the provisions were unfair, Judge Teetor determined that the sales agreement was a standard form contract, that there was no evidence of any serious bargaining as to any of the material terms of the contract, and that there was an enormous disparity of bargaining power between respondent and the individual consumers. He concluded that the contract was therefore "adhesive" in nature. (I.D. 364-369) The ALJ concluded that "the same legal consequences should not attach to formation of an 'adhesion contract' as to formation of one closely

bargained by parties of roughly equivalent strength," (I.D. p. 269) and concluded that all four of the provisions cited above were unfair contract terms.[70]

As the Commission recently noted in *Horizon*, *supra*, whether a consumer contract is "adhesive" does not determine whether its provisions are unfair or deceptive under Section 5. Rather, a finding that a contract is adhesive simply defines the level of scrutiny that the Commission applies to its analysis of the fairness of the contract's terms. As we stated there at 843:

> [I]f a contract is adhesive in nature and its terms appear unreasonably harsh, the Commission will, as the courts have scrutinize those terms carefully to determine if they are unconscionable, unfair, or deceptive . . . [T]he determination whether a term is unfair or deceptive depends on its operation in a specific factual context.

Respondent's sales agreements clearly have characteristics of an adhesive contract. They are pre-printed, standardized forms containing provisions which are not the result of bargaining between two relatively equal parties. Indeed, the disparity of bargaining power between respondent and buyers is manifest. Respondent's sales plan is targeted to ordinary consumers, not to potential investors with prior experience in purchasing land or in making other significant investments. As against the experience of a large, well-known corporation involved in the sale of large developments, these individual consumers had little opportunity or ability to question the claims and representations made by AMREP, to evaluate the risks of investing in unseen land, or to

70. Respondent argues that the issue of whether its contracts were adhesive was not properly noticed. (RAB 6-7) While the complaint does not specifically mention "adhesion contracts", it does refer to "standard form contracts" and several of the standard contract provisions (paragraphs 4, 36 and 37, 40, 41, 42, 46 and 47). Those references were adequate to give notice that the fairness of certain of respondent's standard contractual provisions were in issue. Moreover, there is no prejudice to respondent in any event because the ALJ's finding that respondent's contract was adhesive does not necessarily mean that it is unfair or deceptive. See discussion in text, above.

assess the terms of the contract. Respondent's "high pressure" sales tactics further diminished the buyer's ability to consider carefully what was being offered.

As noted above, however, finding that respondent's standard sales contract is adhesive in nature does not end the inquiry. In considering whether a provision in an adhesive contract is legally unfair, the Commission focuses primarily on the existence of unjustified, substantial, and unavoidable consumer injury.[71] In that context, we turn to the specific terms at issue.

A. *Charging Interest*

Most of the buyers of respondent's lots pay a "deferred payment price," which in effect includes interest on the unpaid balance of the purchase price. Judge Teetor found this practice of charging interest, where the seller retains title and possession of the lot, to be an unfair practice in violation of Section 5. The ALJ reasoned that the buyers were receiving nothing of value which would justify the seller charging interest. (I.D. 370-375)

We reverse the ALJ's finding for several reasons. In the first instance, there is no evidence in the record to show that buyers who sought to use the land were ever denied the privilege of using it by respondent, although the ALJ's conclusion that respondent had the legal right to possession in probably correct.[72] Therefore, the record does not seem to clearly establish consumer injury flowing from this provision. Secondly, the ALJ's conclusion that buyers get nothing apparently does not take into account the fact

71. *Horizon*, *supra* at 849-50, citing letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980), outlining the Commission's views on the boundaries of its consumer unfairness jurisdiction.

72. The record is not entirely clear with respect to the exact nature of the buyer's right to, or interest in, the land during the payment period. As the ALJ found, the contracts contain no express provision concerning possession, and therefore, under a common law interpretation, the right to possession remains with the party retaining title. (I.D. 371) However, respondent notes that in each of the three states in which its developments are located, the buyer receives an "equitable estate." (RAB 61)

that buyers receive the seller's forbearance from demanding payment in full at the time of the sale, in addition to obtaining a fixed price and the conditional right to a specific piece of property.

Whatever reservations we have about the ALJ's decision on this point, it is unnecessary for us to resolve them since we find that the lawfulness of the practice was never challenged or litigated in this proceeding and therefore is not properly before the Commission. The ALJ believed that paragraph 54 of the complaint put the practice into issue (I.D. at 7), while complaint counsel suggested that it is raised also by paragraph 4. (C. Ans. 64) We disagree. Paragraph 4 simply describes respondent's sales contract; it does not challenge its legality. Paragraph 54 is a broad "catch all" charge that AMREP's continued retention of *any* funds is unlawful because they were obtained through deceptive and unfair practices. The paragraph does not distinguish between interest payments and any other payments made by buyers to respondent. In examining the record, it is clear that neither complaint counsel nor respondents introduced any evidence or arguments concerning the practice of charging interest. We find that the issue was not raised at trial, and therefore is not properly before us at this time. Accordingly, we reverse the ALJ's finding on this point.

B. *Alienability of Land*

Respondent's standard land sales contract for Rio Rancho, Eldorado, and Oakmont Shores provides that the purchaser can transfer his contract only with the consent of respondent. The Rio Rancho clause, for example, provides that:

> [T]his Purchase Agreement and any rights or interests hereunder are transferable by Buyer only with written consent of Seller on forms furnished by the Seller and upon payment of a transfer fee, provided all payments due under this agreement to the date of transfer shall have been made.

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(CX 155 B)

The ALJ found that such a clause, appearing in an adhesion contract, was an "oppressive" and "unfair" provision which deprived buyers of their right to transfer their property without restriction. (I.D. 388)

We reverse the ALJ's finding on this point simply because the issue of the fairness of this provision was not raised in the complaint or litigated before the ALJ, as conceded by complaint counsel. (C. Ans. 64) In passing, however, we would note the failure of the record to show any consumer harm, since there is no evidence to suggest that respondent ever withheld permission to transfer or that consumers were discouraged from transferring because of the existence of the clause in the contract. Therefore, we reverse and grant Respondent's appeal on this point.

C. *Integration/Disclaimer Clause*

Paragraphs 36 and 37 of the complaint charged that it was an unfair practice for respondent to include an integration clause in its form contract in the face of numerous oral sales claims which differed in material respects from the terms of the contract.

The ALJ found that respondent used a standard integration clause in all of its land sales contracts.[73] In addition, respondent also included a disclaimer that "no oral representations have been made to induce Buyer(s) to enter into this agreement" in contracts at Silver Springs Shores and Oakmont Shores. (I.D. 384).

73. A typical clause appears in the Rio Rancho sales contract, as follows:

> I [We] understand that by signing below I am [we are] offering to purchase the lot(s) on the conditions set forth, and it is agreed that this Purchase Agreement sets forth the entire agreement between the parties, that no agent or representative of the Seller shall have any authority whatsoever to change or modify this Agreement in any manner, or to make any other agreement or representation on behalf of the Seller, and that if Rio Rancho Estates, Inc. signs a copy hereof this will be a binding contract, which may not be modified or amended except in writing, signed by Buyer and Seller. (CX 286 A)

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The ALJ found that both clauses were unfair. Although the clauses would not, in fact, have precluded buyers from showing oral representations in a suit against respondent for fraud, Judge Teetor found that the clauses would have the tendency to mislead buyers into believing that they would be so barred. Citing *Automobile Owner's Safety Insurance Co.*, 53 F.T.C. 956, 961 (1957), the ALJ found that "such provisions might discourage in some instances the making of otherwise valid claims."

In *Horizon*, we reversed a similar finding by the ALJ that an integration clause in a standard form land sales contract was unfair in the absence of any record evidence that buyers were, in fact, discouraged from asserting their legal rights against Horizon Corporation. There we, noted:

> In the absence of concrete evidence that consumers were chilled from asserting their legal rights when they read the integration clause contained in Horizon contracts, or that the respondent misrepresented the operation of the clause, we decline to find that respondent's use of such clause constitutes an unfair practice. *Horizon*, *supra*, at 848.
>
> The record in the instant proceeding is equally devoid of evidence that consumers were discouraged from bringing suit against respondent by the presence of the integration clause in their contracts. Consequently, we reverse the ALJ on this issue.
>
> Respondent's contracts for two developments, Oakmont Shores and Silver Springs Shores, contain the additional disclaimer that no oral representations had been made to induce the purchaser to buy. Considering the substantial evidence concerning respondent's well organized sales presentation, filled with deceptive oral claims, the contract disclaimer is clearly false. While requiring consumers to sign a contract containing a patently false representation is reprehensible, it is not legally "unfair" under Section 5 in the absence of any showing of unjustified, substantial

and unavoidable consumer injury. As with the integration clause, the disclaimer would not bar a buyer from showing oral claims in a suit against respondent for fraud. Further, the record does not show that consumers were discouraged from bringing such a suit for fear that evidence of oral claims would not be admitted. Since the record is silent as to consumer injury, we must reverse the ALJ's finding on this point.

D. *Forfeiture Clause*

Respondent's sales contracts for each of its four developments contain versions of a "forfeiture clause." Under this clause, upon default of the buyer,[74] respondent recovers all rights to the land and, in addition, retains all payments made by the buyer (including taxes, interest, and assessments) as "liquidated damages." The contracts make no distinction between an early default and a late one.

The complaint charged, and the ALJ found, that respondent's inclusion and enforcement of the forfeiture provision in its standard form contract were unfair practices in violation of Section 5. (Complaint paragraphs 40-41; I.D. 383) In essence, the ALJ believed that the land sales contract should most equitably be considered a mortgage, in which the principal right of the creditor is "to the money and his right to the land is only as security for the money." (I.D. 378) Judge Teetor found it "grossly unfair" that

74. A typical provision is found in the Rio Rancho contract, Guarantees and Conditions of Sales (CX 155 B):

> If Buyer shall be in default for a period of 60 days in the making of any payments exactly as due, Seller shall have the right to terminate this Contract by mailing to Buyer notice in writing of its election to do so, sent by registered or certified mail. If within 14 days after Seller so mails such notice, Buyer does not pay in full all payments then in default (i) all rights of Buyer hereunder and in and to the lot(s) described on the first side shall cease and terminate, and (ii) all payments made by Buyer may be retained by the Seller, as liquidated damages and not as a penalty.

Respondent's contract at Silver Springs Shores contained a sliding scale of grace periods, geared to the percentage of price already paid in.

respondent should be entitled to the payments as well as to the land securing the payments.

The Commission considered a similar forfeiture clause in *Horizon*. There, the Commission concluded that a 100% forfeiture clause, appearing in an adhesion contract for the sale of land, signed in an atmosphere of high pressure sales tactics, unequal bargaining power and deceptive misrepresentations, violated Section 5's proscription on unfair practices. *Id.* at 848-852. In determining that the forfeiture clause in *Horizon* was unfair, the Commission found that the clause had caused substantial consumer injury by permitting Horizon to retain sums greatly in excess of any actual damages occasioned by the purchaser's default. Further, the Commission found no evidence of any countervailing benefits to consumers or to competition from the 100% forfeiture clause, and concluded that consumers could not have readily avoided the injury because they were unable to bargain over such clauses, contained in a contract "adhesive in nature and signed in an atmosphere of deceptive misrepresentations." *Horizon*, *supra*, at 850. While the Commission's conclusion that the clause caused unavoidable, unjustified and substantial consumer injury would have been sufficient to sustain a finding of legal "unfairness," additional support for the Commission's conclusion came from an examination of public policy contained in the common law against unconscionable contracts negotiated in an atmosphere of deception, the Uniform Commercial Code, and the developing trend in state and federal law toward the imposition of limitations on forfeiture clauses in installment land sales contracts. We concluded from these sources that there was a clear public policy against harsh contract terms, such as the 100% forfeiture clause in this case, which are unreasonably favorable to one party when the other party lacks meaningful choice because of deception in the inducement of the contract. *Id.* at 851.

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A very similar pattern of practices has been demonstrated here. As noted above, respondent's contract has elements of an adhesion contract, being offered as a "take-it-or-leave-it," non-negotiable agreement between two parties of vastly disparate bargaining power. The high pressure sales campaign, combined with serious misrepresentations about the nature and the value of the investment being offered, negate the presumption that such a harsh provision as the 100% forfeiture clause was the product of free bargaining. The forfeiture clause enables respondent to retain sums greatly in excess of any actual damages incurred by the buyer's breach. The record indicated, and the ALJ found, that respondent's overhead and sales cost amounted to no more than 40% of respondent's "cash price." (I.D. at 277; Larramore, Tr. 16444-16447; Friedman, Tr. 24117; RPF 77) The injury is not theoretical: the record contains specific evidence of substantial consumer injury. (*See*), *e.g.*, Grimaldi, Tr. 4794-98; Yarnall, Tr. 6154; Reynolds, Tr. 8415.) We find no evidence that the clause provides any countervailing benefit to consumers or competitors. Finally, the authorities cited in *Horizon* establish that such a clause violates established public policy.[75] Accordingly, applying the rationale developed in *Horizon*, we find that respondent's 100% forfeiture clause, contained in a contract signed under the pressure of powerful sales tactics, unequal bargaining power, and substantial misrepresentations, causes significant, unjustified and unavoidable consumer injury in violation of Section 5.

75. The conclusion that 100% forfeiture clauses cause unjustified consumer injury is bolstered by Congress' determination in enacting the 1979 amendments to ILSFDA to limit such clauses. (R. Rep. 19-21) Under section 1703(d) of the Act, as amended, any forfeiture provision must provide that the seller can retain, on buyer's default, no more than the greater of 15% of the purchase price (excluding interest), or actual damages. If a contract fails to contain such a provision, the buyer is entitled to cancel at any time and for any reason within two years from the date of purchase and to receive a full refund of all monies paid. See section 1703(e).

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VI. *Procedural Issues*

Respondent raises a host of procedural and evidentiary errors on the part of the ALJ. (RAB 2-18) Some of those are discussed elsewhere in this opinion. We find no showing of impropriety or a clear abuse of discretion in respondent's allegations of error concerning a variety of discovery and evidentiary rulings. For the most part, the allegations made deal with credibility of witnesses and exhibits, admissibility and relevance of evidence, and scope of discovery, rulings which are within the ALJ's scope of discretion. In this section, we deal with those allegations of errors that merit some discussion. Unless otherwise stated herein, we affirm the ALJ's decision and reject respondent's procedural appeals.

A. *Consideration of the Entire Record*

Respondent alleges that the Initial Decision is defective because it is not based on a consideration of the whole record, as required by the Commission's Rule of Practice § 3.51(b)(3). (RAB 2-6) As evidence, it points to the ALJ's failure to give credence to or even mention the testimony of several of its witnesses and documentary exhibits.

The ALJ is not required to discuss the testimony of each of the nearly 250 witnesses or the 1500 exhibits that were presented at the extensive administrative proceeding in this case. Rather, he is required to make findings on those issues of fact, law or discretion which are material and to support those rulings by the record evidence which he finds reliable, probative and substantial. Rules of Practice 3.51(b). *Stauffer Laboratories, Inc.* v. *FTC*, 343 F.2d 75, 82 (9th Cir. 1965). *See also, Baltimore & Ohio Railroad Co.* v. *United States*, 298 U.S. 349, 359 (1936). In any event, the Commission has independently reviewed the record in making its determinations of fact and law, and the Commission, not the ALJ, has the ultimate responsibility for finding of facts. Consequently, the failure of the ALJ to refer to parts of the record is not prejudicial to the respondent and does not constitute reversible

error. *Standard Distributors, Inc.* v. *FTC*, 211 F.2d 7 (2d Cir. 1954).

B. *Ex Parte Communications*

Respondents claim that they were prejudiced by *ex parte* communications between complaint counsel and the Commission. (RAB 12-13) The contacts at issue occurred in 1978 when complaint counsel sought Commission authorization to intervene in certain class action lawsuits pending against AMREP in federal court. After the close of the administrative record, respondent moved to reopen the proceeding and to have all *ex parte* materials dislosed to it; in July, 1978, all such relevant materials, including complaint counsel's memorandum to the Commission, were placed on the public record. The ALJ denied respondent's motion and refused to certify an interlocutory appeal since the Initial Decision was due shortly. Respondent then filed suit seeking interlocutory review of that decision in United States District Court. *Amrep* v. *Pertschuk*, No. 79-0491 (D.D.C. Apr. 6, 1979), *aff'd*, No. 79-1592 (D.C. Cir. Apr. 30, 1980). In denying AMREP's requested relief, the district court noted that all "existing *ex parte* communications even remotely related to [AMREP] have been disclosed and are on the public record" and that the proper forum for raising its arguments of prejudice was on appeal before the Commission.

Despite this notice, respondent has failed in its appeal brief to discuss the manner in which the *ex parte* contacts in this case have allegedly deprived it of due process or prejudiced its right to a fair hearing. Instead of presenting its argument on appeal, respondent moved for a hearing to introduce evidence, comment and argument concerning *ex parte* communications, which was denied by the Commission on February 19, 1980.[76] It is evident that respondent has chosen not to raise this issue on appeal,

76. Order Denying Motion for a Hearing to Introduce Evidence, Comment and Argument Concerning Ex Parte Communications, (February 19, 1980).

although it is clear that respondent was well aware that it had the right to do so and had sufficient time in which to do so. Accordingly, we find that respondent has waived its right to raise this issue on appeal.

C. *Brady Ruling*

Respondent challenges the ALJ's "inconsistent" treatment of certain discovery requests. (RAB 12) While the ALJ granted complaint counsel's request for an expansion of its documents and witness lists, he denied respondent's request that complaint counsel provide all exculpatory materials in complaint counsel's possession or control, pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963).

We see no basis for error. We have previously held that the rulings of *Brady* and its progeny are inapplicable to administrative proceedings. *Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969). The fact that the ALJ found reason to grant complaint counsel's request to expand their witness and document list does not support respondent's conclusion that its *Brady* request should similarly have been granted. The ALJ granted complaint counsel's request, notwithstanding his previous turnover order, because he was entirely satisfied with complaint counsel's explanation for and good faith in not submitting the supplementary nominations earlier, and found that the additions would not result in unfairness to, or an undue burden on, respondent.[77] We have repeatedly stated our intention to grant ALJs discretion in conducting discovery, and absent a clear abuse of that discretion, we find no reason to disturb the ALJ's determinations.

77. Complaint counsel explained that the delay was due to the unavailability of the information because of its use in the concurrent criminal proceedings against AMREP in federal court in the Southern District of New York.

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D. *Reliance by ALJ on Respondent's Conviction in the Criminal Trial*

Respondent also protests that the ALJ relied on the conviction in *U.S.* v. *Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977), in arriving at his "heart of the case" finding that respondent misrepresented the growth, development and investment value of it properties. (RAB 18-19) This reliance was improper, respondent asserts, because the ALJ had previously ruled that he would consider the evidence in this proceeding *de novo*. In reliance on this ruling, respondent says it did not introduce evidence in explanation or mitigation of the jury verdict.

We see no error. The ALJ's Initial Decision demonstrates a thorough and independent review of the administrative trial record, and -- as he states -- his conclusions are based on that record. In referring to the criminal conviction, the ALJ merely notes that his own findings are virtually identical to the facts cited by the Court in *U.S.* v. *Amrep Corp., supra.* (I.D. p. 265) We see no prejudice to respondent of its right to a full *de novo* proceeding on all the facts at issue, and we do not rely upon respondent's conviction in our findings.

E. *The Commission's "Reason to Believe" Determination*

Respondent argues that the ALJ erred in striking respondent's affirmative defense that the Commission did not have "reason to believe" that respondent had violated the law when it issued the complaint. (RAB 11) While respondent fails to present any argument in its appeal brief as to why it believes that the Commission did not have "reason to believe" at the time it issued the complaint, it appears from the record that respondent alleges that there had been no investigation of Oakmont Shores and Silver Springs Shores to indicate any law violations at the time the complaint was issued. (C. Ans. 13-14; R. Rep. 8-9)

Respondent is not entitled to litigate this issue during the administrative proceeding, which should be concerned with proving whether the allegations of the complaint are supported by

evidence.[78] Permitting litigation on the sufficiency of the pre-complaint investigation or the Commission's determination of "reason to believe" would only invite delay into the hearing process. *See All-State Industries of North Carolina, Inc.*, 74 F.T.C. 1591, 1592 (1968).

VII. *Complaint Counsel's Appeal*

Complaint counsel have appealed certain decisions of the ALJ denying proposed relief.

The first ground of the appeal is that the Commission should reinstitute the relief requested in Section IV of complaint counsel's proposed order, which would prohibit AMREP from selling any land as a "homesite" or "building lot" unless the land met certain conditions and respondent makes certain cost disclosures in the contract. It is clear that the ALJ intended to include this provision in his order, but simply overlooked it. (I.D. p. 282) Respondent does not dispute this point.

However, the Commission believes that a simple ban on misrepresenting a lot as a "homesite" or a "building lot," unless it meets certain conditions, is sufficient, and has included such a provision in Part II of the order. The definition of "homesite" has been adopted from current OILSR regulations. The cost disclosures requested by complaint counsel are already required in OILSR regulations to be in the Property Report. Consequently, there is no need to require a separate statement of those costs in the contract.

Complaint counsel's more significant appeal deals with the ALJ's denial of proposed relief which would prevent AMREP from selling any more land at Rio Rancho and the other three subdivisions involved here until such time as a "viable resale market" comes into existence. In addition, AMREP would be

78. If the Commission's "reason to believe" determination is reviewable by a court of appeals, and if the court of appeals finds that the record is inadequate to review the determination, it could order the Commission to take additional evidence under § 5(c) of the FTC Act. *FTC* v. *Standard Oil of Calif.*, 449 U.S. 232, 244-245 (1980)

required to set up a listing service and help individuals sell their lots. In essence, complaint counsel assert that it is unfair for respondent to continue to sell land in competition with its lot owners who are also trying to sell, particularly considering the vast oversupply of land. Complaint counsel also propose that respondent be required to "buy back" one vacant lot whenever a "building lot" is sold.

There is some justification for complaint counsel's concern that respondent continues to profit from new sales, while buyers who bought in reliance on respondent's deceptive misrepresentations concerning future value cannot resell their lots because of the overwhelming excess of supply of land over the demand. But complaint counsel's proposed relief—an indefinite ban on respondent from making any more sales—is an extremely harsh remedy which could only be justified by a compelling showing that no less intrusive remedy would be sufficient to stop continuing, substantial consumer injury. That showing has not been made here. Complaint counsel's proposed relief is neither necessary nor likely to result in the stimulation of a resale market. In the first instance, we see no harm in respondent continuing to make sales of land, as long as those sales are made fairly and free from deception. Consumers who are fully cognizant of the risks, who have not been misled as to any short-term investment potential, and who have been able to visit the land to inspect it without harassment from the seller, should have the opportunity to buy respondent's land if they want to. To the extent that respondent can continue making sales, it will add some revenue to the company which may enable it to continue the slow process of development around the core areas. Cutting off revenue to respondent resulting from fair sales may have the unwanted effect of destabilizing whatever market forces there may be for continued development.

VIII. *The Order*

Complaint counsel has not sought restitution in this Section 5 case. To the extent that buyers are entitled to restitution or

redress for past injuries caused by respondent's deceptive and unfair practices, such restitution or redress must be sought in this case in a proceeding under Section 19 of the FTC Act, 15 U.S.C. § 57(b). We agree with the ALJ that the record of this case satisfies the statutory requirements of Section 19 for consumer redress. *See FTC* v. *MacMillan Inc. and La Salle Extension University,* No. 81 C6053 (N.D. Ill., Aug. 3, 1983); *FTC* v. *Turner,* CCH 1983-1 Trade Cas. £ 65,244 at 69,448 (M.D. Fla. December 29, 1982). At such time as the Commission's order in this case becomes final, the Commission will consider whether to seek consumer redress for the acts and practices discussed herein, in accord with the provisions of Section 19.

We adopt much of the basic order proposed by complaint counsel and adopted, in large part, by the ALJ. While there have been a number of significant changes, as discussed in more detail below, the Commission finds that the basic provisions of the proposed Order are necessary to stop ongoing deceptive and unfair practices of the respondent, and to prevent the use of such practices with respect to other land sales activities the respondent may engage in in the future. The first section, Part I, contains several definitions. Part II limits certain representations with respect to any unimproved land respondent may sell and requires respondent to substantiate future investment value claims. Part III requires respondent to deliver a pre-sale Notice to Buyers which will inform them of the purpose of the sales presentation and provide buyers with important pre-sale information. Part III also requires certain warning disclosures in promotional materials. Part IV requires respondent to include in its land sales contracts a number of important rights for buyers, including an option to cancel within 7 days after buying. Part IV also requires respondent to contractually bind itself to provide utilities or facilities if it represents that such utilities or facilities will be provided, and to provide certain refunds to buyers who default. Part V contains a number of miscellaneous provisions. It requires respondent to make disclosures about respondent's building exchange

lot program, and to provide buyers who have visited their property within 6 months a notice of a right to cancel after inspection. It further bars respondent from enforcing the 100% forfeiture clause in any existing contract, and requires respondent to send a letter to its lot buyers informing them of this Order. Part VI requires respondent to police its sales activities to ensure that its employees or agents are complying with the terms of the Order.

On the whole, the Order is designed to ensure that consumers approach the sophisticated, hard-sell tactics of the respondent forearmed with some knowledge.

A. *Part I - Definitions*

A number of changes have been made in the Order's definitions proposed by the ALJ. In some instances, the changes have been made to make the definitions clearer and simpler (*e.g.*, the definition of "Property Report") or to avoid the need for repetition within the order (*e.g.*, definition of "AMREP").[79] Other changes are intended to limit the scope of the order. For example, the order has been limited to apply only to the sale of land which is not improved by commercial or residential building. The record evidence demonstrates abuse only in the sale of unimproved land and complaint counsel urge an order only with respect to such land. The factors involved in the selling of improved property are likely to differ considerably from those involved in the sale of vacant subdivided land to distant purchasers, and the order provisions designed to address the practices demonstrated in this record might not be appropriate in sales involving improved property. Accordingly, we see no reason to extend the order to cover the sale of improved real estate. While not binding on us, we note

79. The Order's definition of AMREP makes clear that General Development Corporation, which purchased Silver Springs Shores from AMREP in early 1983, is not bound by the Order. This provision is pursuant to the Commission's Order of September 30, 1982, binding General Development Corporation to certain offers and improvements at Silver Springs Shores in exchange for the Commission's agreement not to hold it liable as a successor or assign to AMREP under any final order.

that complaint counsel and respondent are in agreement that this limitation on the scope of the order is appropriate. (RAB 66; C. Ans. 68) Certain definitions have been dropped in view of the Commission's decision to deny complaint counsel's appeal for further relief (*e.g.*, "resale market" and "development land"). Finally, other definitions were revised so that they would more closely conform with the regulations of the Office of Interstate Land Sale Registration (*e.g.*, "homesite").

B. *Part II—Misrepresentation*

Part II of the Order addresses the use of certain representations typically made by respondent and its sales representatives during the course of selling land at the four subdivisions involved here. While portions of Part II are similar to the proposed Order adopted by the ALJ, we have made substantial revisions in other portions. As proposed, the ALJ's Order was too broad and could have had the effect of precluding respondent from providing potentially helpful—and truthful—information to prospective buyers.[80]

The most important revision relates to the claims which are at the heart of this case: representations that the vacant land offered for sale constitutes an excellent investment opportunity. Rather than simply barring respondent from making such claims in the future, the Order as revised adopts a substantiation standard which will permit respondent to make limited claims with respect to investment potential in the future, provided that it has, at the time the claim is made, adequate substantiation to support the claim. While the complaint alleged simply that respondent's claims were false and did not charge that respondent failed to have adequate substantiation, a substantiation requirement is justified here as a "fencing-in" provision to prevent respondent

80. The right to engage in truthful and nondeceptive commercial speech is, of course, protected by the First Amendment. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *American Home Products Corp.* v. *FTC*, 695 F.2d 681, 713-714 (3d Cir. 1982).

from engaging in similar conduct in the future. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). *See also Bristol-Myers Co., et al.*, Docket No. 8971 (Opinion and Order, July 5, 1983). Further, a substantiation requirement, as opposed to a strict and potentially overbroad ban, serves the public interest by enabling respondent to provide truthful and not misleading information to potential buyers who might be interested in the investment potential of land.

The Order distinguishes between claims concerning past or present facts, which are verifiable and readily substantiated by a variety of objective data, and claims about future investment value, which are inherently forecasts or predictions. Part II(A) requires that, if respondent represents that any land has been a good or safe investment, or that the demand for, or market value of, any land has increased, or that the resale of any land has not been difficult, respondent must substantiate those claims with competent and reliable data. At a minimum, the data must include historical data of sufficient actual individual resales of lots in the same subdivision (and in the same condition) to demonstrate that the claim is representative of the typical buyer. In essence, Part II(A) requires respondent to have an actual track record of individual resales before it can make claims as to past or present trends affecting investment value. The scope of this section of the Order applies to any unimproved land, not just land sold by respondent or land at the four subdivisions involved here. Such a broad scope is necessary to prevent future violations of the FTC Act.

Part II(B) of the Order addresses respondent's use of forecasts or projections of future trends that affect investment value. Such statements are, of course, predictions or opinion. While consumers might ordinarily be expected to resist simple expressions of opinion about the probability of future events, where, as here, a seller engages in a course of deceptive misrepresentations and high pressure sales tactics representing itself as an established and reputable community developer, expert in land sales and land

valuation, and makes representations about the future value of land which do not honestly represent its own opinion, such representations must be carefully circumscribed to prevent further deception. Consistent with past Commission policy of opting for disclosure over prohibition where feasible, *American Home Products* v. *FTC*, 695 F.2d 681, 713 (3d Cir. 1982), Part II(B) sets out three requirements.

First, respondent must possess and rely upon all reasonably available competent and reliable evidence at the time it makes such a claim. This provision requires respondent to make a reasonable search for data supporting or refuting its forecast or projection.

Second, the data relied upon by respondent must be sufficient so that it would be generally accepted by the community of experts qualified to make such representations as providing a reasonable basis for the projection or forecast. Obviously, what such data will consist of will vary, depending on the nature of the claim made. A highly specific representation will probably be easier to substantiate under this claim than a broad claim of future investment value. In any event, the order incorporates an objective standard which will look to the standards of the relevant expert community in determining whether the data relied upon provides a reasonable basis for respondent's opinion.[81]

Third, at the time any such representation is made, the Order requires respondent to provide to the buyer a copy of a written statement containing the material bases and assumptions for the

81. In a strict sense, the term "reasonable basis" is not used in the same sense as it appears in other Commission deceptive advertising cases. *See, e.g., Pfizer, Inc.*, 81 F.T.C. 23 (1972). A reasonable basis usually implies that a claim is backed by sufficient objective data relating to a verifiable performance claim to lead the maker of the claim to believe that the claim is, in fact, true. Such a standard is not appropriate for a statement of opinion about future events, which are by their very nature not objectively verifiable at the time that they are made. For such claims, it is sufficient that the maker of the claim has relied upon the type and quality of data which experts in the field would reasonably rely upon in making such a prediction.

representation, and disclosing the buyer's right to inspect respondent's substantiating data on request, which respondent is required to honor. This provision is intended to give the buyer the opportunity to weigh the probativeness of respondent's data and to make an individual determination about the weight to be given it. Such information may also prove very helpful to any professional assisting the buyer in evaluating the purchase opportunity. This disclosure is similar to provisions which the Commission has adopted with respect to projections and forecasts in other contexts.[82]

Part II(C) of the Order prohibits respondent from misrepresenting certain facts in the future.

Part II(D) prohibits respondent from engaging in certain other sales practices, which, while not necessarily deceptive or unfair in and of themselves, have the capacity to prevent reasoned consideration and to make the buyer more susceptible to deceptive statements and practices. (I.D. pp. 264-265) Provisions variously prohibit discouraging buyers from seeking assistance; failing to give the required property reports; filling out a contract before the buyer says he wants to buy; sending in new sales representatives after the buyer has decided he doesn't want to buy; making any statements about the buyer's rights or duties, or the development of the land, which differ from the contract or the property report; and using contract provisions which allow the seller to retain more than the amounts allowed in Section IV(F) of the Order in the event of the buyer's default.[83]

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82. *See, e.g.*, Disclosure Requirements and Prohibition on Franchising and Business Opportunity Ventures, 16 C.F.R. Part 436.1(b) (1983).

83. We have dropped a provision found in the ALJ's Order which prohibited respondent from "artificially enhancing" the appearance of its subdivisions in its promotional films. Complaint counsel failed to produce probative evidence that such "enhancements" were material or that they had any tendency or capacity to deceive consumers. (I.D. 64.1) We have also dropped the ALJ's order provision prohibiting respondent from representing that its promotional materials had been produced independently of respondent when respondent had influenced the materials. The ALJ made only very cursory findings on this issue.

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C. *Part III—Notice to Buyers and Disclosures in Promotional Materials*

Section III of the Order requires respondent to give to buyers, at least two days before any in-person meeting, a "Notice to Buyers" which contains critical information. We are convinced after our study of this record that a post-sales cooling-off period by itself is not sufficient to give consumers an adequate opportunity to evaluate land offered for sale by this respondent. Indeed, respondent's sales representatives frequently told buyers that they need not pay particular attention to signing the contract since they would have sufficient time to cancel the sale later on. A limited cooling-off period appears not to give consumers an adequate chance to shake off the fevered excitement created by the respondent's carefully structured sales presentation. Consequently, we find that a limited pre-meeting disclosure notice, which gives a prospective buyer time to decide whether or not this is an offer he or she wishes to hear more about *before* being subjected to respondent's lulling claims, is necessary to prevent further deceptive sales practices. Warning consumers that they will be subjected to a sales pitch for land enables consumers who know that they are susceptible to such pitches to simply stay away and avoid temptation. However, we have made a number of changes to make the document as brief as possible, to help ensure that buyers will actually read and use the information it contains. Further, we agree to some extent with respondents' arguments that the Notice, as proposed, was unduly prejudicial and would, in fact, have effectively foreclosed any sales. In particular, we have deleted the proposed disclosure of AMREP's criminal conviction.[84] We believe that strict compliance with this Order will be

(I.D. 64, 64.2) The record does not contain sufficient evidence to support a finding of deception, and a fencing-in prohibition does not seem necessary since such conduct does not appear to be integrally related to respondent's deceptive conduct in this case.

84. Respondent is already required to disclose the criminal conviction of several of its officers in the federal property report under OILSR regulations. *See* 24 C.F.R. § 1710.116(c). In addition, it would be

sufficient to prevent the abuses we have seen in the past and require AMREP to conduct its business operations in a fair and honest manner in the future. We have also deleted provisions requiring disclosures summarizing plans for development and respondent's responsibility for them. Generally, the record does not contain evidence that respondent misrepresented the present state of development of its subdivisions or its obligation to install utilities and facilities. These required disclosures therefore are unnecessary. In addition, the same disclosures are required to be in the HUD property report, which under the 1979 amendments, must be given to buyers *before* the sales presentation. 15 U.S.C. § 1703(a). Including the same disclosures in our pre-sale notice to buyers is likely to cause consumer confusion and could thereafter overwhelm the prospective buyer with too much information. We have also deleted the proposed requirement that respondents establish a toll-free telephone number; we simply fail to see the utility of such a provision.

Paragraph III(B) of the Order requires respondent to include a disclosure in all printed promotional material warning buyers that the future value of land is very uncertain. Part III(C) requires respondent to include in all other promotional materials, including television and radio commercials, a brief disclosure advising buyers to get the property report and read it before buying anything.

Respondent argued that these disclosures are inconsistent with OILSR regulations which only require a reference to the property report in printed materials, and that the Commission should limit itself to such relief. (RAB 70) We disagree for several reasons. Most importantly, we have found that respondent has engaged in an extensive campaign of deception and unfair practices. Under

required to disclose the present administrative action. Several state laws also evidently require the prominent disclosure of criminal convictions, as evidenced by some of the state property reports in the record. *See, e.g.*, RX 1738.

Of course, nothing in the Order will affect any additional disclosure requirements required by state or federal laws or regulations.

such circumstances, what requirements Congress or HUD might choose to impose on law-abiding companies may be insufficient for the law violator. In such cases, the Commission is permitted to fence in the respondent and go beyond what may be required generally of other companies in order to avoid future law violations. We think that it is clear from the record that respondent has very effectively used slickly produced films and carefully scripted dinner party presentations to market its land as a good, profitable investment. These minimal disclosures are therefore necessary in non-printed material. Further, warnings in written materials about this respondent in addition to those required for other land sellers are altogether warranted.

D. *PART IV - Contract Provisions*

Part IV provides significant protection for future buyers of land from respondent. It requires certain protections and disclosures to be included in contracts, including requiring respondent to give buyers the right to cancel within seven business days after signing the contract and within seven days after visiting the land (within six months after signing the contract), provided that the land was not seen prior to the sale. However, while the general provisions remain similar to the ALJ's order, we have made a number of important modifications.

Part IV(A) requires respondents to title their contracts for the purchase of land as such and to cease using deceptive and confusing titles, such as "Reservation for the Purchase of Land" which are inaccurate descriptions of the contents of the documents and which can easily mislead consumers.

Part IV(B) sets out the significant "cooling-off" provision which enables consumers to cancel their purchase, for any reason, within seven days of the purchase. We have made a number of changes in the Order proposed by the ALJ in order to make the provision more closely conform with the OILSR regulations and with orders in effect against other land sales developers. Some of these changes are discussed below.

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First, the language of the disclosure has been modified slightly to eliminate any inconsistency between the language required by the Order and by OILSR regulations. 24 C.F.R. § 1710.209(F)(3)(i). While OILSR and the Order each require *additional* disclosures, the disclosures which overlap are now identical so that unnecessary duplication of language is avoided. In addition, the cooling-off period has been shortened from the 10-day period found in the ALJ order to seven days, as contained in the OILSR regulations. Considering the additional protections for AMREP's customers in this order, we see no reason to depart in this instance from the seven day cooling-off period required for all other land sellers.

The ALJ's order would have prevented all communications between the buyer and the seller during the cooling-off period. The record shows that some limitation on the ability of the seller to make further pitches or create additional sales pressure during this time is necessary; however, the ALJ's order goes too far. Respondent may have a valid non-sales reason for contacting the buyer during the time, such as checking (per Section VI) to make certain that the buyer has received all of the documents required by this Order or that no contrary claims have been made. Similarly, the buyer may well have the need to obtain additional information. The ALJ's order is also deficient in that it provides the buyer the right to cancel and receive a full refund at any time prior to the final payment if there is a sales contact during the cooling-off period. Such a penalty goes too far; allowing the buyer to receive a full refund eight years following the alleged contact puts respondent in an impossible position to verify whether a violation of the Order has in fact occurred. A more modest approach has been adopted here, one which is designed to address the particular harm caused by the sales contact. If a contact occurs, the buyer's cooling-off period will be extended to 45 days from the date of purchase, provided that the buyer notifies the seller of the contact.

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The disclosure required in Paragraph D of the ALJ's order has been simplified and incorporated into the single disclosure required in Paragraph B of this Order.

The form of the cancellation notice adopted by the ALJ in his Paragraph E has been deleted entirely. The notice of the cancellation right is prominently announced in the contract, and additional papers might distract the buyer from carefully considering the contract. Further, the federal property report, which now must be given to prospective buyers before a sale, contains a cancellation notice and a cancellation form. We have also dropped the requirement that respondent orally inform the consumer of his or her right to cancel. Such a provision is virtually unenforceable; in addition, the written notice is sufficient to put the buyer on notice of his right to cancel.

Part IV(C) of the order requires AMREP to refund and cancel within 30 days from receipt of a notice of cancellation. We find that the 10 day period specifically required in the ALJ's order is too short and inflexible, and therefore adopt respondent's suggestion that it be given 30 days. (RAB 71)

Part IV(D) requires respondent to make any representations that it will install utilities or facilities to be included in the contract for the sale of land. This provision is consistent with ILSFDA and OILSR regulations. 24 C.F.R. Part 1715.19(f). We do not, however, adopt the suggestion by the ALJ and complaint counsel that we go farther and require all representations in the property report and the Notice to Buyers to be included as part of the land sales contract. While a land seller is free to incorporate the property report by reference into the contract under ILSFDA and OILSR regulations, 24 C.F.R. Part 1715.19(f)(3), we think it is sufficient here to prohibit respondent from making any representations which are materially inconsistent with the contract, notice to buyers, or property report. *See* Part II(D)(5).

We also decline to require respondent to give buyers the option to get a full refund or an exchange lot in the event that AMREP

fails to complete promised improvements within six months of the promised date. As respondent notes (RAB 70), such a right goes well beyond reimbursing the buyer for any damages which the buyer may suffer as a consequence of respondent's failure to make the promised improvements, and is inconsistent with the regulatory scheme set up by Congress in the 1979 ILSFDA amendments, which would give consumers contract damages only. 15 U.S.C. § 1703(a)(2)(D). While we required such a right in *Horizon*, there is little evidence in this case, in contrast to *Horizon*, that AMREP misrepresented the state of development, or its development obligations, or refused to honor such obligations. Indeed, AMREP was not contractually bound to install utilities or build facilities, and consequently the proposed provision would add little protection in any event.

Part IV(E) and (F) of this Order require AMREP to give future buyers of land the right to a limited refund in the event of the buyer's default. As discussed in detail above, we have found that the use of the 100% forfeiture clause as contained in respondent's land sales contract, in conjunction with a sales program laced with deception and misleading statements, is unfair and deceptive. We recognize, as did Congress in enacting the ILSFDA amendments, that an honest seller has a right to keep some of the payments made which represent actual damages suffered by the seller as a consequence of the buyer's default. Accordingly, we have adopted the ILSFDA provision which would enable respondent, in future sales under this Order, to retain the greater of 15% of the purchase price or respondent's "actual damages."

However, we do not adopt the additional restriction proposed by the ALJ to put a 40% maximum cap on the amount of "actual damages." While the record indicates that 40% may be an appropriate estimate of past sales costs associated with some of the subdivisions here (I.D. p. 277), such sales costs may well vary significantly in the future. In any event, the burden will be on respondent to demonstrate that any payments retained in excess of 15% of the cash sales price are justified. Further, the ALJ's

Order would have required respondent to refund all interest, assessments, and taxes paid by the buyer. In our view, it is not unfair in a land sales contract to charge a buyer for costs associated with the buyer's interest in the land during the time the buyer is making payments on the principal. That view is also contained in the statutory scheme adopted by Congress in ILSFDA, which permits the seller to retain interest payments. 15 U.S.C. § 1703(d)(3). Of course, buyers who have been defrauded may have the right to a total rescission and refund. To the extent that buyers are entitled to such relief, however, it must be sought in this case under Section 19, and not Section 5.

E. *Part V - Miscellaneous Provisions*

Part V contains a number of significant provisions. Paragraph A, which requires a disclosure about respondent's "exchange right," has been adopted from the ALJ's order. Paragraph B requires respondent to give a buyer who has not seen the land in person prior to purchasing a right to cancel and receive a full refund if the buyer visits the land and chooses to cancel within six months of the signing of the contract. Given respondent's ability to lull consumers by assuring them that they will have the right to cancel after inspection, it is necessary to go beyond the ILSFDA 7-day cooling-off period which applies to all land sellers and mandate certain procedures to ensure that consumers can use that right effectively. For the most part, the Order tracks the Order proposed by the ALJ. Minor revisions have been made to make the order more closely conform to other Orders in effect against AMREP's competitors. The provisions of the order parallel the provisions concerning the right to cancel during the initial "cooling-off" period.

Paragraph I of the ALJ's order would have required AMREP to record all land sales contracts. We see no basis in the record for requiring such conduct, and accordingly do not adopt this provision.

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Paragraphs C and D are based on paragraphs L and M of the ALJ's Order. Paragraph C of the Order bars AMREP from attempting to collect any further payments from defaulting buyers whose contracts were signed before the effective date of the Order. This clause, adopted from the ALJ order, is necessary to prevent AMREP from obtaining future profits by enforcing contracts against defaulting buyers where those buyers entered into them in an atmosphere of fraud and deception. We have, however, adopted respondent's suggestion to permit such payments at the buyer's option. (RAB 72)

Paragraph D prohibits respondent from enforcing the 100% forfeiture clause in existing contracts. The Commission has, however, deleted provisions proposed by the ALJ which related to the standard integration clause since we did not find that the use of such clauses violated Section 5. Similarly, we have also deleted Paragraphs O and P in the ALJ's Order, which would have required respondent to include a contractual clause insuring the free alienability of the buyer's interest, and the extension of all of the buyer's contractual rights to subsequent purchasers or assignees. As we have previously noted, there is no basis in the record for these provisions. In the same vein, the ALJ's added paragraph prohibiting respondent from collecting "interest" has been deleted since this issue was never litigated.

AMREP urges that Paragraphs C and D seek to reform existing contracts and to provide relief for past buyers, which is beyond the scope of the Commission's powers, citing *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974). (RAB 65, 72) We do not believe that the relief contained in these provisions is barred by *Heater*. In *Heater*, the Court rejected the Commission's argument that respondent's continued *retention* of funds obtained through unfair and deceptive means was, in itself, a continuing unfair and deceptive practice which could only be remedied by requiring restitution to bilked consumers. The Court rejected this position on the theory that it would

> permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview.

503 F.2d 321, 323.

In contrast, Paragraph D is directed to future acts and future harm only -- the enforcement of a contract provision, the forfeiture clause, which the Commission has found in this proceeding to be, in the context of the deceptive sales practices engaged in by respondent, unfair and deceptive and in violation of Section 5 of the FTC Act. Until the respondent enforces that clause, upon default by the consumer, or forces payment by threatening that it will enforce that clause, there is no harm. Those consumers who, prior to the Order, lost all of their payments as a consequence of the forfeiture clause, will not receive refunds. That loss must be redressed, if at all, through a Section 19 action. Similarly, Paragraph C prohibits the *future* enforcement of a contract which respondent induced buyers to enter into through deception and unfair practices. Payments made prior to the Order will not be refunded through this Order, but must be sought, if at all, in a Section 19 proceeding.

The intent of these provisions is to prevent future harm. If, as a direct consequence of the prospective operation of this order, respondent must forego collecting sums which would be otherwise due it, this effect on past contracts is permissible because the effect is only ancillary or incidental to future compliance with the order.[85] Such ancillary effects of prospective orders are not

85. In other contexts, courts have recognized the distinction between payments which constitute a form of compensation for past practices, and payments which must be spent to cease engaging in prohibited past practices. Even where the former relief has not been in the power of the court to order, courts have held that such lack of power does not bar the courts from ordering prospective relief that may involved the expenditure of funds to comply. *See, e.g., Quern* v. *Jordan*, 440 U.S. 332, 335 n.6 (1979). (While Eleventh Amendment deprives

barred by *Heater*. The Order does not, therefore, afford private relief for past injuries caused by respondent's acts and practices, but rather only prospective relief for acts and practices which have been found to violate the statute. The order simply requires respondent to refrain from engaging in the future in acts which this Order has found to be unfair and deceptive.

Since, in our view, *Heater* does not bar prospective prohibitions on the enforcement of contract provisions found to be unfair and deceptive, we have modified the ALJ's proposed order to cover all existing contracts, regardless of when they were executed. The date of execution of the contract is irrelevant, since the Order relates only to the *future* enforcement of the contracts.

Paragraph E, which prohibits respondent from obtaining waivers of the rights and privileges afforded by this order, is taken directly from the ALJ's order.

Part VI of the Order requires respondent to institute a program of reasonable surveillance to ensure compliance by its employees and agents and to do business only with those agents and employees who agree to follow the terms of the order. It has been substantially taken from the ALJ's order. We have deleted as unnecessary the requirement that respondents create a toll-free telephone line.

Part VI(K) requires AMREP to mail to its buyers a "truth letter," attached to the Order as Appendix A. The Commission believes that buyers must be put on notice about the facts of their purchases to prevent further injury from respondent's deception. The Appendix has been substantially modified to inform the consumers of this order.

Finally, we dismiss those portions of the complaint as to which complaint counsel failed to carry its burden of proof.

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federal courts of jurisdiction to try cases which would require states to pay compensation to private citizens for past practices, it does not bar injunctive relief which would result in a payment of state funds as a necessary consequence of future compliance; see also, *Williams* v. *Edwards*, 547 F.2d 1206 (5th Cir. 1977).)

Appendix "B"

III. *Conclusion*

We have found that AMREP Corporation has engaged in a sustained campaign of deception and unfair practices. Representing that the vacant lots it offered for sale were excellent, short term investments with little or no risk, respondent portrayed its subdivisions as being poised for rapid suburban or (in the case of Oakmont Shores) recreational development and substantial annual appreciation. In fact, as investments, respondent's vacant lots were unlikely to appreciate in anything but the very long term -- if ever. Generally, in each of its subdivisions, there was sufficient land to absorb even the very highest reasonable predictions of growth. As a result, it was unlikely that there would be any local demand for, and corresponding development and appreciation of, respondent's land until the turn of the century. In reality, respondent's lots were poor investments with substantial risk.

Once respondent had whetted potential buyers' appetites for profit, it used a variety of high pressure sales techniques to get buyers to sign sales contracts. In conjunction with its pervasive misrepresentations, we found that some of those tactics were deceptive.

Finally, once the contract was signed, respondent locked the buyer into the contract by including a provision which permitted respondent to keep all of the money the buyer had paid in, if the buyer defaulted. We found that 100% forfeiture provision to be unfair.

The Order we adopt today will permit AMREP to market its land honestly. It will be required to substantiate investment value claims, and refrain from misrepresentations. A Notice to Buyers will provide prospective buyers with important pre-sale information, and warnings in promotional materials will be required. Required contract provisions include warnings and protections, including a 7-day cooling off period and a right to cancel after a personal inspection of the land. Respondent is banned from using or enforcing a 100% forfeiture clause. Respondent is also required

to send a letter to current owners informing them of our decision and their options. Together with the property reports required by state and federal laws, future purchasers will be forearmed in dealing with AMREP.

For the reasons set forth above, the initial decision of the administrative law judge is modified as described. An appropriate order is appended.

ISSUED: November 2, 1983

[Entered February 7, 1984]

Appendix "B"

CONCURRING STATEMENT OF CHAIRMAN MILLER*

I concur fully in the result reached by the Commission today. I agree that respondents have engaged in "unfair and deceptive practices" as proscribed by Section 5 of the FTC Act. Further, I support the order and believe that it will prohibit respondents from violating the law, while, at the same time, permitting them to market their properties.

I also concur in the Opinion of the Commission in this matter. However, I do not believe that the standard applied in the analysis of the deception issue was the appropriate one. Throughout the opinion, Commissioner Pertschuk describes various practices of respondents as having the "tendency or capacity" to mislead consumers. I agree that respondents' practices, indeed, have the tendency and capacity to mislead consumers as discussed in the opinion. In my view, however, the Commission's standard in deception cases should be: whether the act or practice is likely to mislead consumers acting reasonably in the circumstances to their detriment.

Any ambiguity regarding the standard to be applied can be dispelled by the Commission protocol on deception. However, despite my fundamental disagreement with the meaning of deception articulated in Commissioner Pertschuk's opinion, I am satisfied that the facts regarding respondents' actions satisfy both the deception standard set forth in the opinion and the deception standard which I believe is appropriate. Accordingly, I concur in the result reached by the Commission in this matter.

Finally, I would note that the Commission has recently adopted procedures to reduce the type of time delays with which this decision has been plagued. In a very real sense, justice delayed is justice denied. It is my sincere hope, one which I know is shared by all of my fellow Commissioners, that in the future the Commission's justice will be swift as well as sure.

ISSUED: November 2, 1983

* Commissioner George W. Douglas joins this concurring statement.

APPENDIX "C"

(Judgment of Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-1434

AMREP CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

MAY TERM—July 25, 1985

Before Honorable MONROE G. MCKAY, Honorable WILLIAM E. DOYLE, Circuit Judges, and Honorable WESLEY E. BROWN, District Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that agency is affirmed.

HOWARD K. PHILLIPS, Clerk

*Of the United States District Court for the District of Kansas, sitting by designation.

[Entered July 25, 1985]

APPENDIX "D"

(Statutory Provisions Involved)

Section 5 of Federal Trade Commission Act, 15 U.S.C. § 45

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(a) (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably forseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

Appendix "D"

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in

whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the commission in response to a request made by a person, partnership, or corporation under paragraph[1] (2) not later than 120 days after the date of the filing of such request.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business by filing in the court, within sixty days from the date of the service of such order, a written

petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Appendix "D"

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said compliant, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme

Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order; injunctions and other appropriate equitable relief

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit any pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to

obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

> Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(m) (1) (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

> (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

Section 19 of Federal Trade Commission Act, 15 U.S.C. § 57b.

§ 57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices—Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(a) (1) If any person, partnership, or corporation violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) of this

section in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a) of this title) with respect to which the Commission has issued a final cease and desist order, which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

Nature of relief available

(b) The Court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(c) (1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's

rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

Time for bringing of actions

(d) No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) of this section relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 45(b) of this title which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

Appendix "D"

Availability of additional Federal or State remedies; other authority of Commission unaffected

(e) Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

No. 85-633

Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMREP CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Trade Commission's order in this case exceeded the Commission's remedial authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 768 F.2d 1171. The opinion and order of the Federal Trade Commission (Pet. App. 17a-142a) are reported at 102 F.T.C. 1615. The decision of the administrative law judge is reported at 102 F.T.C. 1373.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a) was entered on July 25, 1985. The petition for a writ of certiorari was filed on October 15, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This Federal Trade Commission enforcement action concerns the techniques used by petitioner to sell undeveloped land to consumers for investment purposes during the years 1961 to 1975. The evidence adduced in the hearings before the administrative law judge (ALJ), as summarized by the Commission (Pet. App. 49a-117a) and the court of appeals (*id.* at 3a-6a, 13a-14a), showed the following. Petitioner marketed its land at carefully orchestrated dinner parties held far from the location of the undeveloped lots being sold to consumers. These parties included a "staged sales presentation of films, slides, testimonials and enthusiastic speeches [which] generated such excitement that many consumers would sign contracts to buy lots at [petitioner's] subdivisions, sight unseen, before the night was over" (*id.* at 49a).

Moreover, petitioner's salesmen used pressure techniques to obtain sales. Thus, "[t]he salesmen were told to create artificial excitement by calling out 'holds' on particular pieces of property" to create the impression of urgency (Pet. App. 4a). The salesmen also told prospective buyers that petitioner planned to increase prices, and "fill[ed] out * * * form contracts [prepared by petitioner] * * * before prospective buyers had indicated their willingness to buy land." *Ibid.*; *id.* at 103a, 104a-105a. Finally, buyers were told that signing the contract "was only a 'reservation' of a particular piece of land" because they had a right to cancel the contract within 72 hours or within six months on the basis of an inspection of the property (*id.* at 106a-107a), but petitioner used

a variety of techniques to ensure that these options were not exercised (*id.* at 97a-99a, 107a).[1]

The theme of the sales presentation "was that the purchase of a lot at one of [petitioner's] subdivisions was an excellent, low-risk investment." Pet. App. 50a; see also *id.* at 50a-51a, 52a-61a, 84a-87a, 90a-91a. The "great majority of buyers" did purchase the land "for investment purposes" (*id.* at 52a). However, the evidence showed that the lots sold by petitioner "were poor investments and represented substantial financial risks to the purchasers" (*id.* at 42a). The selling price of the property exceeded its fair market value, and there was no resale market for the property (*id.* at 61a-80a, 87a-90a, 91a-92a).[2]

Petitioner's standard form contract provided for a down payment of 10%, with the purchaser paying the balance in monthly installments over five to eight years. In addition, "[u]ntil all payments were made, [petitioner] retained title, use and possession of the lot." Pet. App. 109a. The contracts contained a forfeiture clause providing that "upon default of the buyer, [petitioner would] recover[] all rights to the land and, in addition, retain[] all pay-

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[1] The Commission found that "the visitation privilege * * * was * * * unlikely to overcome the main message of [petitioner's] representation: that substantial local demand was just around the corner," because visiting buyers could not evaluate the property's development potential (Pet. App. 98a).

[2] The Commission stated that insufficient evidence was adduced with respect to one of petitioner's four projects to make a finding as to whether petitioner engaged in a deceptive practice by marketing the property in that project as an "excellent" investment. The Commission noted that petitioner did make false statements concerning the demographic pressure weighing in favor of development in the area surrounding the property. Pet. App. 93a.

ments made by the buyer (including taxes, interest, and assessments) as 'liquidated damages'" (*id.* at 115a).[3]

2. In 1975, the Federal Trade Commission issued an administrative complaint against petitioner, alleging that petitioner's marketing techniques constituted unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. 45. Specifically, the Commission alleged that petitioner had falsely represented that the undeveloped property was a safe investment that would result in short term profits, and had made false representations concerning both the growth rates of the areas in which the properties were located and the value of the land. It also alleged that petitioner used unfair high-pressure sales tactics and form contracts containing unfair and illegal provisions. Pet. App. 2a-3a, 40a.

After compiling a hearing record consisting of approximately 25,000 pages and 1,500 exhibits, the administrative law judge held that petitioner had engaged in unfair and deceptive acts and practices.[4] He found that petitioner's "misrepresentations con-

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[3] A typical forfeiture clause is quoted at Pet. App. 115a n.74.

[4] Hearings before the ALJ were stayed shortly after they began pending the completion of a criminal trial of petitioner and its principal officers on charges of mail fraud and violations of the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.*, arising out of petitioner's property sales. Petitioner and its officers were convicted on 20 counts of mail fraud and five counts of ILSFDA violations, and the convictions were affirmed by the Second Circuit. *United States* v. *AMREP Corp.*, 560 F.2d 539 (1977), cert. denied, 434 U.S. 1015 (1978).

cerning the growth, development, and investment potential of its properties" and petitioner's "high pressure sales techniques" constituted unfair and deceptive acts and practices violative of Section 5. Pet. App. 40a-41a. In addition, the ALJ held that several provisions of petitioner's contracts, including the forfeiture clause, constituted unfair practices (*id.* at 41a).

The Commission unanimously concluded that petitioner had engaged in unfair and deceptive conduct (Pet. App. 38a-142a). It held that petitioner's "misrepresentations and failures to disclose material facts [regarding the property's investment potential] are deceptive acts and practices in violation of Section 5 of the FTC Act." Pet. App. 80a; see also *id.* at 80a-84a.[5]

The Commission also held that petitioner's "high-pressure marketing techniques" violated Section 5. It observed that "some of [petitioner's] express claims were simply false," and therefore deceptive (Pet. App. 107a); other techniques were deceptive because they "reasonably could lead consumers to believe that they were required to purchase [petitioner's] land immediately in order to ensure an opportunity to purchase, contrary to fact" (*id.* at 107a-108a); and that still other tactics "facilitated [petitioner's] efforts to mislead consumers and accordingly are in themselves deceptive practices which violate Section 5" (*id.* at 108a).

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[5] The Commission rejected petitioner's claims that the deception was dispelled by disclosure documents provided to purchasers (Pet. App. 95a-97a); that petitioner's representations were statements of opinion for which it was not liable (*id.* at 99a-103a); and that the purchasers' right to exchange one lot for another eliminated any injury due to the deception (*id.* at 93a-95a).

Finally, the Commission held that the inclusion and enforcement of the forfeiture clause in petitioner's contracts constituted an unfair practice. It found that "[t]he high pressure sales campaign, combined with serious misrepresentations about the nature and the value of the investment being offered, negate the presumption that such a harsh provision as the 100% forfeiture clause was the product of free bargaining" (Pet. App. 117a). It further found that actual damages incurred by petitioner upon a buyer's breach of contract typically totaled no more than 40% of the stated contract price (*ibid.*). Thus, the forfeiture clause enabled petitioner "to retain sums greatly in excess of any actual damages," caused documented and substantial consumer injury, and provided no countervailing benefits to consumers (*ibid.*). Relying on its decision in *Horizon Corp.*, 97 F.T.C. 464, 851 (1981), the Commission held that the provision was unfair under Section 5.[6]

The Commission concluded that petitioner had "engaged in a sustained campaign of deception and unfair practices" (Pet. App. 124a, 140a), and that an order was necessary "to stop [the] ongoing deceptive and unfair practices" and prevent such practices with respect to petitioner's future land sale activities (*id.* at 124a). The order imposes several restrictions upon petitioner's future land sale activities, including requirements that petitioner substantiate fu-

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[6] The Commission rejected petitioner's claims that the Interstate Land Sales Full Disclosure Act eliminated or at least limited the Commission's jurisdiction over unfair land sales practices (Pet. App. 44a-47a); petitioner's claim that it was immune under the state action defense (*id.* at 48a-49a); and petitioner's procedural challenges to the ALJ's decision (*id.* at 118a-122a).

ture investment value claims, provide buyers with certain pre-sale information, and include in its contracts specified rights for buyers (*id.* at 124a, 126a-136a).

The Commission's order also prohibits petitioner from enforcing in the future the illegal 100% forfeiture clause in existing contracts and bars it from invoking the clause to collect payments from past buyers in default (Pet. App. 31a, 137a).[7] In addition, the order directs petitioner to send a disclosure letter to past buyers to advise them of the Commission's findings and their legal rights so as "to prevent further injury from [petitioner's] deception" (*id.* at 139a; see also *id.* at 33a, 35a-36a).[8]

3. The court of appeals unanimously upheld the Commission's decision (Pet. App. 1a-16a). The court agreed that petitioner "had engaged in a systematic pattern of unfair and deceptive conduct" (*id.* at 14a). It rejected petitioner's arguments that the Commission's remedial order was overbroad, observing that "[t]he Commission has broad discretionary

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[7] The order permits petitioner to include in future contracts a forfeiture provision complying with requirements of the Interstate Land Sales Full Disclosure Act, which limits the amount of liquidated damages a land seller may collect to the greater of the seller's actual damages or 15% of the cash sales price. See Pet. App. 27a, 117a n.75.

[8] The Commission calculated that the "total consumer injury caused by [petitioner's] deceptive representations" with respect to sales at one project amounted to more than $200 million (Pet. App. 82a). When its order becomes final upon the completion of all judicial review (15 U.S.C. 45(g)), the Commission may initiate a civil action against petitioner under Section 19 of the FTC Act, 15 U.S.C. 57b, seeking restitution or other forms of redress for the injuries suffered by consumers (Pet. App. 124a).

authority to remedy unfair trade practices" (*ibid.*). First, the court held that the Commission's prohibition upon the enforcement of the forfeiture clause was permissible because the prohibition did not reform the contracts, but "merely prevent[ed] [petitioner] from continuing to profit from its inclusion of an illegal forfeiture clause in its past contracts" (*id.* at 15a). Second, the court held that the Commission's requirement that petitioner send notices to past purchasers was permissible because it was "reasonably related to [petitioner's] past violations and practices" and within the Commission's authority to order affirmative disclosures to remedy deceptive practices (*id.* at 15a-16a).[9]

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that it "engaged in a systematic pattern of unfair and deceptive conduct" (Pet. App. 14a); it objects only to two provisions of the order issued by the Commission to remedy these violations. The decision of the court of appeals upholding the Commission's exercise of its broad remedial authority is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

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[9] The court of appeals also rejected petitioner's claims that the Interstate Land Sales Full Disclosure Act impliedly repealed the Commission's authority over unfair practices in connection with land sales (Pet. App. 6a-8a); petitioner's procedural challenges to the Commission's decision (*id.* at 8a-13a); and petitioner's argument that the Commission's remedial order should not apply to its sales to the public of property with utility services (*id.* at 16a).

This Court repeatedly has recognized that "the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist." *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957); see also *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-613 (1946). Accordingly, " 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' " *National Lead Co.*, 352 U.S. at 428, quoting *Jacob Siegel Co.*, 327 U.S. at 613. The order issued by the Commission here plainly satisfies this standard.

1. Petitioner first challenges (Pet. 3-9) the portion of the order directing it to forbear from enforcing or threatening to enforce the forfeiture clause contained in the land sales contracts. First, it is clear that this provision of the order falls within the Commission's broad remedial authority. The Commission found (and petitioner does not here contest) that the forfeiture clause was an unfair practice violative of Section 5 of the FTC Act; its order barring petitioner from enforcing that clause therefore is directly related to the statutory violation. Indeed, this Court has upheld an order barring the future enforcement of contracts found to violate Section 5. *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 372, 375-377 (1965); see also *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 23 (7th Cir. 1971); cf. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 356-366 (1980).[10]

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[10] Petitioner states (Pet. 4) that the forfeiture clause in its contracts "is and has been widely used and is enforceable under the laws of almost every state." Petitioner ignores the fact that the Interstate Land Sales Full Disclosure Act limits

Second, petitioner's assertion (Pet. 3-4) that the decision below upholding this provision of the order conflicts with *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), is incorrect. The order at issue in *Heater* "in effect command[ed] [the respondent before the Commission] to make restitution of the moneys secured by [the unfair deceptive practices]" (*id.* at 321 (footnote omitted)). Here, the Commission's order does not require petitioner to refund any money to defrauded purchasers; it simply bars the future enforcement of the unlawful forfeiture clause.

Petitioner argues that the principle applied in *Heater* bars the Commission from issuing any order that has a "retroactive impact" (Pet. 8), but the court of appeals there held that the order exceeded the Commission's authority because it constituted "private relief for *harm caused by acts which occurred before the Commission had declared a statutory violation*" (503 F.2d at 323 (emphasis added)). Thus, the court below correctly interpreted *Heater* as "stand[ing] only for the proposition that the Commission cannot order retroactive private relief (*e.g.*, restitutionary relief or rescission of a contract) in a cease and desist order. It does not impede the Commission from forbidding the enforcement of illegal contracts" (Pet. App. 15a). Here, "[u]ntil [petitioner] enforces [the forfeiture] clause, upon default by the consumer, or forces payment by threatening that it will enforce that clause, there is no harm" (*id.* at 138a). Since the order thus relates to harm

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such forfeiture provisions to the greater of 15% of the purchase price or the seller's actual damages (15 U.S.C. 1703(d)), and that 100% forfeiture clauses of the type included in petitioner's contracts are disfavored under the laws of several states (see *Horizon Corp.*, 97 F.T.C. 464, 851 & n.73 (1981)).

that would be caused to consumers by the *future* enforcement of the forfeiture provision, not harm caused by past conduct, it would not be barred under *Heater*.[11] Indeed, any interpretation of *Heater* that prohibited an order simply because the order affected pre-existing contracts would conflict with this Court's decision in *Atlantic Refining Co.* upholding an order that invalidated pre-existing contracts. There is no indication that the Ninth Circuit intended to adopt such a broad rule in *Heater*.[12]

Finally, there is no merit to petitioner's argument (Pet. 6-7) that Section 19 of the FTC Act, 15 U.S.C.

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[11] The fact that the order imposes costs relating to a contract entered into prior to the issuance of the order does not render the order invalid under *Heater*. The *Heater* court itself recognized that a remedial order is not invalid simply because it imposes economic costs for conduct occurring before the issuance of the order declaring the conduct illegal (503 F.2d at 324-325 n.13).

Petitioner intimates (Pet. 4 & n.3, 6) that the order bars it from terminating the rights of a defaulting purchaser and would prevent it from reselling a lot under contract to such a purchaser. These exaggerations are simply an effort to avoid the Commission's finding that the forfeiture clause constitutes an unfair practice; "[h]aving lost the battle on the facts, [petitioner] hope[s] to win the war on the type of decree" (*FTC* v. *National Lead Co.*, 352 U.S. at 429). Nothing in the Commission's order prevents petitioner from retaining possession of property in the event of a default, instituting procedures to allow resale of the property, commencing an action to recover its actual damages due to the default as calculated under the applicable state law rule, and retaining the purchaser's payments in an amount equal to such damages.

[12] We do not acquiesce in the view of the Commission's authority adopted in *Heater*, but no question regarding the correctness of that decision is presented here because the Commission carefully drafted the order to comply with the rule set forth in *Heater* (see Pet. App. 137a-139a).

57b, bars the Commission from prohibiting future enforcement of the forfeiture clause. After a Section 5 cease and desist order has become final, the Commission is authorized by Section 19 to commence a civil action against the respondent in order to obtain the relief necessary "to redress injury to consumers * * * resulting from * * * the unfair or deceptive act or practice"; the relief may include rescission or reformation of contracts, payment of damages, and notice to the public of the violation. The statute specifically provides that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law" (15 U.S.C. 57b(e)), and Congress expressly stated that it did not intend "to modify or limit any existing power the Commission may have to itself issue orders designed to remedying [*sic*] violations of the law" (S. Conf. Rep. 93-1408, 93d Cong., 2d Sess. 42 (1974)). Accordingly, this express grant of authority to reform or rescind illegal contracts provides no basis for a limiting interpretation of the Commission's authority under Section 5. *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 757-758 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978); cf. *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).[13]

2. Petitioner also claims (Pet. 9-12) that the Commission exceeded its authority by directing petitioner to inform past purchasers of their legal rights. This provision of the remedial order obviously is rea-

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[13] Petitioner's reliance upon Section 19 is misplaced for the additional reason that Section 19 only relates to retroactive relief for *past* wrongdoing. Here, by contrast, the portion of the remedial order challenged by petitioner prohibits petitioner from enforcing the forfeiture clause in the *future*. Section 19 is thus completely irrelevant in this context.

sonably related to petitioner's illegal conduct. Petitioner's customers must decide whether to continue to make payments in order to gain title to their property, whether to seek private legal advice, and whether to continue to pay taxes and other government fees in order to retain their possibly valueless land. The notice required by the Commission simply informs purchasers of the facts concerning their transactions and apprises them of possible legal options, allowing them to proceed in the future on the basis of the true circumstances, rather than permitting them to continue to rely upon petitioner's deceptions. The notice requirement thus serves "to prevent further injury from [petitioner's] deception" (Pet. App. 139a). Such affirmative disclosures consistently have been held to be within the Commission's authority. *Warner-Lambert Co.* v. *FTC*, 562 F.2d at 756; see also *Grolier Inc.* v. *FTC*, 699 F.2d 983, 987-988 (9th Cir.), cert. denied, 464 U.S. 891 (1983).

Petitioner erroneously asserts (Pet. 9-12) that the decision below upholding this notice requirement conflicts with *Congoleum Industries, Inc.* v. *CPSC*, 602 F.2d 220 (9th Cir. 1979), and *Barrett Carpet Mills* v. *CPSC*, 635 F.2d 299 (4th Cir. 1980).[14] The courts in those cases considered a notification requirement that was part of a recall plan, and the decisions rest upon *Heater*'s prohibition against an order requiring restitution (see 602 F.2d at 226, 635 F.2d at 301-302). Here, by contrast, the notice was not part of a refund plan; the Commission ordered petitioner to provide notice in order to remedy the future conse-

[14] Those cases interpreted the remedial scope of Section 5 of the FTC Act because that provision is incorporated by the Flammable Fabrics Act, 15 U.S.C. 1194.

quences of petitioner's deception. If the true facts are not conveyed to the purchasers, the purchasers will continue to act on the basis of petitioner's misrepresentations and therefore will fall victim to additional harm as a result of these misrepresentations. This provision of the order reduces the possibility of future harm, and thus does not conflict with *Heater*. As the court of appeals held (Pet. App. 15a), the notice requirement plainly was permissible here.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] Petitioner repeats its argument that this provision of the order is barred by Section 19 of the FTC Act. As we have discussed (see pages 11-12, *supra*), the savings clause in that statute makes clear that it does not restrict the Commission's remedial authority under Section 5.

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No. 85-633

IN THE

Supreme Court of the United States

October Term, 1985

AMREP CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF AMREP CORPORATION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF AMREP CORPORATION*

This case presents the need for review by this Court to resolve important issues, as to which the Circuit Courts are in conflict, regarding the scope of the power granted by Congress to Respondent, the Federal Trade Commission ("FTC") under Section 5 of the FTC Act, 15 U.S.C. § 45. The Solicitor General does not dispute the importance of the issues presented, but has attempted, by a series of erroneous arguments, to diminish their significance.

1. In arguing that the decision below is consistent with the relevant case law (Opp. Brief, p.9), the Solicitor General has not cited any authority which is germane to the issue. In *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), the Court held that the FTC did not have the power under § 5 of the FTC Act to declare an act previously accepted as lawful to be "unfair" and simultaneously recast the consequences of conduct occurring prior to the entry of

* Reference is made to the Petition for information concerning Petitioner's affiliates.

its order. None of the cases cited by the Solicitor General even address that issue.

2. The Solicitor General (Opp. Brief, p. 9 n 10) attempts to justify the FTC's retroactive invalidation of the so-called forfeiture clause by asserting that the use of such a clause had been limited by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(d). However, § 1703(d) does not prohibit the use of such clauses, but simply requires that use of a clause providing for forfeiture of more than the greater of 15 percent of the purchase price or the amount of the seller's actual damages must be coupled with the grant to the buyer of a two-year right to rescind the contract. More significantly, § 1703(d) was not enacted until 1979 -- long after the overwhelming majority of Petitioner's contracts were executed -- and was given *prospective* application only. Consequently, that statute imparted no notice to Petitioner at the time of execution of its land sale contracts that they might subsequently be determined to be "unfair" under § 5 of the FTC Act.

3. The Solicitor General attempts to distinguish this case from *Heater* by arguing (Opp. Brief, p. 11 n 11) that the FTC's Order does not prevent Petitioner from recovering damages against a contract purchaser in default or from pursuing other remedies. However, the Solicitor General cites no legal authority to support that argument, and has perhaps overlooked the fact that paragraph V.C. of the Order (App. B., p. 31a) prohibits Petitioner from suing to recover moneys due from a purchaser in default. As noted in the Petition (p. 4), Petitioner's land sale contracts do not contain a promise by the purchaser to pay any money, nor do they provide any remedy to Petitioner other than that specified in the so-called forfeiture clause, which the FTC has abrogated.

Although the FTC found that Petitioner's overhead and sales costs amounted to approximately 40% of the contract price (App. B, p. 117a), and permitted Petitioner to retain its actual costs in connection with the default of a purchaser under any contract executed after the FTC's Order becomes final (App. B, p. 27a),

the Order contains no similar provision with respect to existing contracts, which are left in limbo. Thus, in order to free its land from a contract with a defaulting purchaser, Petitioner would be compelled to provide a refund. Accordingly, the FTC has by circumvention achieved the result proscribed by *Heater*, while paying lip service to that decision. The statement in the Opposition Brief (p. 11 n 12) that "[w]e do not acquiesce in the view of the Commission's authority adopted in *Heater*" is amply supported by the result achieved below.

4. The argument by the Solicitor General (Opp. Brief, p. 10) that the Order is addressed to future conduct is purely semantical. An order directing a respondent to cease and desist from retaining moneys paid under a pre-existing contract or from refusing to refund moneys previously paid thereunder would also purport to be directed to future conduct. However, the restrictions intended by Congress on the power of the FTC to order retroactive relief would be nullified if the form of the order, rather than its substantive impact, were determinative. The substantive effect here is the nullification of contract rights created before Petitioner was put on notice that the use of its contract clauses would be deemed to be in violation of federal law, and the reformation of Petitioner's contracts.

5. The Solicitor General (Opp. Brief, p. 13) has misconstrued *Congoleum Ind., Inc.* v. *CPSC*, 602 F.2d 220 (9th Cir. 1979), and *Barrett Carpet Mills* v. *CPSC*, 635 F.2d 299 (4th Cir. 1980), in asserting that they are not in conflict with the decision below. In those cases the Ninth and Fourth Circuits, respectively, held that notification to past purchasers could not be compelled under § 5 of the FTC Act. The fact that those cases also involved orders providing for the recall of products is inapposite to the issue here. The holdings in those cases that § 5 does not confer the power to order notification to past purchasers are independent of the holdings that § 5 does not authorize recall orders, and squarely conflict with the decision below. "We . . . find no authority . . . for an order of recall *or* of notification." *Barrett Carpet Mills, supra*, 635 F.2d at 302 (emphasis added).

It may also be noted that the conflict between the Fourth and Ninth Circuits, on the one hand, and the Tenth Circuit, on the other hand, is particularly significant in light of the fact that respondents in FTC proceedings generally have a wide latitude in choosing the Circuit to which to petition for review of an FTC order. Section 5(c) of the FTC Act (App. D, p.146a) provides for review of FTC orders

> "in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business. . . "

Hence, given a choice, respondents burdened by FTC orders requiring notification would be well advised to petition to the Fourth or Ninth Circuit and to avoid the Tenth Circuit. Such potential for forum shopping is in itself a sufficient basis to resolve the conflict among the Circuits here.

6. Finally, the Solicitor General's interpretation of § 5 would make § 19 of the FTC Act, 15 U.S.C. § 57b, superfluous. If the FTC has the power under § 5 to order notification to past purchasers and the reformation of contracts, what is the purpose of § 19? It is submitted that relief of that nature, which the Solicitor General concedes is "retroactive relief" (Opp. Brief, p. 12 n 13) can *only* be obtained in a proceeding under § 19 -- in which the FTC must prove to a court that the act or practice "is one which a reasonable man would have known under the circumstances was dishonest or fraudulent," 15 U.S.C. § 57b(a)(2).

It is that proof which satisfies the due process requirement for the imposition of retroactive relief -- a person who intentionally commits a dishonest or fraudulent act can hardly claim unfair surprise when subsequently directed to remedy his wrongful act. Such proof is not required in a § 5 proceeding, and that is the reason, as more fully articulated by the *Heater* Court, why Congress refused to authorize the FTC to order retroactive relief in a § 5 proceeding. A fair reading of the statutory scheme in light of the Congressional history compels the conclusion that the FTC

acted without authority here in ordering notification to Petitioner's past purchasers and the reformation of Petitioner's contracts executed prior to the time Petitioner was given notice that the use of a commonly-used contract clause would be deemed to be in violation of federal law.

The conflict among the Circuits here is real and irreconcilable and involves an important issue of federal law, having substantial due process implications, which should be resolved by this Court.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

AMREP CORPORATION *v.* FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85–633. Decided February 24, 1986

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The Federal Trade Commission ordered petitioner to cease various unfair trade practices in selling land, and required, among other things, that petitioner send all customers still under land sale contracts with it a letter disclosing that the Commission had brought an action against petitioner and explaining possible courses of action the customers might take. The United States Court of Appeals for the Tenth Circuit affirmed the Commission's order over petitioner's objection that the notification order was not within the Commission's remedial authority under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45. 768 F. 2d 1171 (1985). The Tenth Circuit's decision is at odds with decisions of the Fourth and Ninth Circuits holding that § 5 authorizes only cease and desist orders, and not notification orders. See *Barrett Carpet Mills, Inc.* v. *Consumer Product Safety Commission*, 635 F. 2d 299 (CA4 1980); *Congoleum Industries, Inc.* v. *Consumer Product Safety Commission*, 602 F. 2d 220 (CA9 1979).* I would grant certiorari to resolve this apparent conflict.

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*The decisions in *Barrett*, *supra*, and *Congoleum*, *supra*, are interpretations of the powers of the Consumer Product Safety Commission under the Flammable Fabrics Act, 15 U. S.C § 1191 *et seq.* Since 15 U. S. C. § 1194 incorporates § 5 of the Federal Trade Commission Act by reference, *Barrett* and *Congoleum* are effectively interpretations of the scope of § 5.